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Supreme Court of the United States.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 87.

AXEL W. HALLENBORG *et al.*,
Plaintiffs and Appellants,

vs.

COBRE GRANDE COPPER COMPANY *et al.*,
Defendants and Respondents.

BRIEF FOR APPELLANT.

ALFRED B. CRUIKSHANK,
of Counsel for Appellant.

L. MIDDLEDITCH CO., 93 DUANE ST., N. Y.

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vs. Cobre Grande Copper Company, *et al.* appellees. Assignment of errors. Filed May 16, 1904. S. M. Cullom, clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

341 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 13th day of January A. D., 1903, the same being one of the regular judicial days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG, ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY, ET AL., Appellees,
} No. 822.

Comes now Jno. J. Hawkins, Esq., attorney for appellants herein, and moves the court that this cause be heard on oral argument.

Now comes W. H. Barnes, Esq., for appellees herein, and moves the court that this cause be passed.

Now comes Jno. J. Hawkins, Esq., for appellants herein and moves the court that this cause be submitted at the present time. It is ordered by the court that this motion be denied.

And afterwards and upon to-wit the 19th day of January, A. D., 1903, the same being one of the regular judicial days of the
342 January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees.
} No. 822.

Comes now J. F. Wilson, Esq., for appellants, and moves the court to grant appellants' motion to set this cause for hearing at some time during the present term of court, and extend the one hour limit for argument.

It is ordered that this motion be passed for the present, and if presented Friday morning, January 23, 1903, will be considered.

And afterwards and upon to-wit the 23rd day of January A. D., 1903, the same being one of the regular judicial days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

343 AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

It is ordered that the motion to set cause for hearing at sometime during the present term of court and extend the one hour limit for argument, filed herein by appellants, be continued until March 20th, 1903.

On motion of J. C. Herndon, Esq., attorney for appellees herein it is ordered that he have until May 1st, 1903, in which to file briefs.

And afterwards and upon to-wit the 20th day of March, A. D., 1903, the same being one of the regular judidical days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY, Appellees. } No. 822.

On motion of J. F. Wilson, Esq., attorney for appellants herein, it is ordered that this cause be set for hearing May 23rd,
344 1903.

And afterwards and upon to-wit the 23rd day of May, A. D. 1903, the same being one of the regular judicial days of the January term, A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY, ET AL., Appellees. } No. 822.

On motion of Jno. J. Hawkins, Esq., attorney for appellants herein, it is ordered that Henry G. Atwater, Esq., be entered of record of counsel for appellants.

This cause coming on for hearing was argued by Jno. J. Hawkins, Esq., for appellants and by Messrs. W. H. Barnes and Ben Goodrich for appellees, and argument continued until this afternoon.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

345 AXEL W. HALLENBORG, ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY, ET AL., Appellees. } No. 822.

Argument was resumed in this cause by Messrs. Ben Goodrich and M. A. Smith, for appellees, and Henry G. Atwater for appellants, and concluded by W. H. Barnes for appellees, and cause ordered submitted.

And afterwards and upon to-wit the 12th day of January A. D., 1904, the same being one of the regular judicial days of the January term A. D., 1904, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY, E. B. Gage, W. M. Adamson, John H. Costello, J. Henry Wood, and Con O'Keefe, its Directors; William C. Greene, George Mitchell, Phœnix National Bank of Phœnix Arizona Territory, Cananea Consolidated Copper Company, Greene Consolidated Copper Company, Appellees. } No. 822. (Judgment.)

346 This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises: It is ordered that the judgment of the district court be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that the appellees herein, do have and recover of and from Axel A. Hallenborg and J. Edward Addicks, appellants herein, and Fidelity and Deposit Company of Maryland, surety on appeal bond, their costs in this court, taxed at twenty-eight and 75/100 ($28.75) dollars, and their costs in the court below in this cause incurred.

And afterwards and upon to-wit the 26th day of March A. D. 1904, the same being one of the regular juridical days of the January term A. D., 1904, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

It is ordered that the motion for re-hearing, filed herein by appellants, be and the same is hereby submitted.

347 And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

It is ordered that the motion for re-hearing, filed herein by appellants, and heretofore submitted, be and the same is hereby denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

In this cause, Jno. J. Hawkins, Esq., attorney for appellants, in open court gave notice of appeal from the judgment of this court, to the Supreme Court of the United States, and moved the
348 court that the appeal be allowed, and that it fix the amount of the cost bond on appeal, whereupon, it was ordered by the court that the appeal be allowed, and it was further ordered that the amount of the bond on appeal be fixed in the sum of one thousand ($1,000.) dollars.

349 Clerk's Certificate.

UNITED STATES OF AMERICA,
Territory of Arizona, } *ss:*

I, Shelby M. Cullom, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 348, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Axel W. Hallenborg, *et al.* appellants, against The Cobre Grande Copper Com-

pany, *et al.*, appellees, as the same remain of record and on file in said office.

Also that the citation attached hereunto, is the original citation issued by said supreme court of the Territory of Arizona.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Phœnix, Arizona, this 15th day of June, 1904.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

350 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
versus
COBRE GRANDE COPPER COMPANY, a Corporation, *et al*, Appellees.
} A Citation

The United States of America to Cobre Grande Copper Company, a corporation, E. B. Gage, W. M. Adamson, John H. Costello, Henry Wood, and Con O'Keefe, directors; William C. Greene, George Mitchel, Phœnix National Bank of Phœnix, Arizona, Cananea Consolidated Copper Company, Sociedad Anonima, and Greene Consolidated Copper Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, sixty days from the date hereof, pursuant to an appeal allowed by the honorable chief justice and the judges of the supreme court of the Territory of Arizona, on the 16th day of May, A. D. 1904, from a judgment rendered by said court, on the thirteenth day of January, A. D. 1904, the same being so rendered on final hearing of appellants' above entitled appeal, and from the order made
351 and rendered by said court on the 26th day of March, A. D. 1904, denying the petition of said appellants for a rehearing of their said appeal, to show cause, if any there be, why the said judgment and order should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of May in the year of our Lord one thousand nine hundred and four.

EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

Services of the foregoing citation admitted this 16 day of May, A. D. 1904.

L. H. CHALMERS,
Attorney for Appellees.

[Endorsed:] No. 882. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *vs.* Cobre Grande Copper Company, a corporation, *et al*, appellees. A citation. Filed May 16, 1904. S. M. Cullom clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

Endorsed on cover: File No. 19,453. Arizona Territory supreme court. Term No. 87. Axel W. Hallenborg and J. Edward Addicks, appellants, *vs.* Cobre Grande Copper Company *et al.* Filed August 23rd, 1904. File No. 19,453.

(c.) Because said action as shown by said contract on its face, resulted in leaving the trust imposed in his hands as such trustee and which he has accepted, without a trustee to carry out the purposes of the trust, which should not be permitted in equity.

Seventeenth. The court erred in failing to hold that the facts established at the trial entitled appellants to the appointment of a receiver for the Cobre Grande Copper Company, for the reason that it appears from said facts that the directors now in office of the Cobre Grande Copper Company, were hostile in interest to said company and had procured control thereof and their appointment as directors, for the sole purpose of preventing the company from prosecuting its claims to the mines in controversy and to enable appellee Greene and his interests to retain control and possession of said mines, thereby to defraud appellants and all others in like estate, of their rights and interests in and their remedies against said company.

Eighteenth. The court erred in failing to remand this cause with directions that a mandatory injunction issue in favor of ap-
337 pellants, directing the return to the custody of the Phœnix national bank of the deeds and escrow papers which had been originally placed with said bank under the Mitchell-Greene contract and which had afterwards been delivered by said bank to appellee Greene; or, in case said papers had been lost or destroyed, that duplicates thereof be executed and deposited with said bank pending the determination of its litigation, for the reason that the judgment of the Maricopa County court, directing the return of said deeds to Greene, was collusive and void, for the reasons hereinbefore set forth and for the additional reason that it was not authorized under the pleadings in the case in which it was rendered.

Nineteenth. The court further erred in overruling appellants' motion for a rehearing filed in this cause, for the reasons specifically stated therein and for the errors hereinbefore set forth.

Twentieth. The court erred in affirming the judgment appealed from, for the reason that the statement of facts in the nature of a special verdict, found and certified by said court for the purposes of this appeal, show that prior to December 12, 1900, the Cobre Grande Copper Company, through its officers, agents and attorneys, was engaged in various litigations with some of the appellees herein, wherein it was seeking to protect and enforce its claimed rights in the mining properties in controversy for the use and benefit
338 of its stockholders, among whom were the appellants herein; that on said December 12, 1900, the president of the Cobre Grande Copper Company entered into an agreement with the then adversaries of said company in its pending litigations, whereby said company purported to divest itself of all its rights in said litigations and mining properties and renounce the same to its adversaries; that in pursuance and performance of said agreement, said litigations were abandoned and dismissed; that under said agreement, the officers, directors, attorneys of the Cobre Grande Copper Company received various special benefits; that appellants although

both were large stockholders and appellant Hallenborg was a large creditor of said company, were ignored and no provision made for the recognition of their rights; that the Cobre Grande Copper Company is now dominated and controlled by appellee Greene and his associates, having been divested of all its properties and choses in action; that unless equity comes to the aid of appellants, their rights and interests in said company will be rendered valueless and they will suffer great and irreparable damage and injury.

In view of all of which, it was the plain duty of a court of equity either to appoint a receiver as prayed for, or to grant such other and different relief as appeared meet and proper in the premises.

Twenty-first. The court erred in denying and refusing to
339 make and certify the statement of facts in the nature of a special verdict requested by appellants and in holding that the affirmance by the supreme court of Arizona of the judgment of the trial court amounted to an affirmance of the findings of the trial court and precluded the supreme court of Arizona from making and certifying a statement of facts in any way different from the findings of the lower court, for the reasons:

(*a*.) That the form of statement requested by appellants included only material matters proven by uncontroverted testimony in the record, was fair, impartial and complete, and should have been adopted by the court;

(*b*.) That the findings of the lower court did not completely set out the material facts proven and contained a partial statement of the case, which omitted many proven facts material to appellants' case and which are set out in the statement presented by appellants and refused by the court;

(*c*.) Under 1 Supp. R. S. U. S., p. 7, being p. 80, 43d. Cong., 1st sess., Apr. 7, 1874, it was the imperative duty of the supreme court of Arizona to examine into the record of this case and make and certify a statement of facts in the nature of a special verdict, which should include all material facts proven by uncontroverted testimony;

(*d*.) That under said law of Congress, the supreme court of Arizona was required in this case to examine the record and prepare
340 a statement of facts in the nature of a special verdict from the record itself, regardless and independent of the findings made by the lower court.

All of which assignments and specifications of error are most respectively submitted and reversal prayed for thereon.

HAWKINS, ROSS & ANDERSON,
J. F. WILSON,
ATWATER & CRUIKSHANK,
Attorneys for Appellants.

(Endorsed:) No. 822. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants,

no good consideration for the notes, and that the same were paid.

Further answering, said defendants pleaded the proceedings and judgment in the Third District Court of Arizona, as aforesaid; also the pleadings and judgment in the El Paso Court; also that Hallenborg acquiesced in the agreement of December 12, 1900, through his agent, Grant R. Bennett; and that the said Greene acted upon that acquiescence; and, therefore, that Hallenborg is estopped from making his claim herein.

Said defendants further pleaded a counterclaim of one hundred thousand dollars ($100,000) damages against the plaintiff for wrongfully publishing his claims and these proceedings with purpose to injure Greene and the Greene Consolidated Copper Company. No evidence on this last matter was offered at the trial.

The defendant directors of the defendant Cobre Grande Copper Company and the Phoenix National Bank answered to the merits as follows:

They set up that in the suit brought in the Third District, Maricopa County, referred to in the complaint, by the Cobre Grande Copper Company against Greene *et al.*, to prevent the delivery to Greene of the deeds to said mining property, the judgment was for the defendant, and they pleaded the same as a bar.

They also pleaded as a bar judgment in an action between the Cobre Grande Copper Company and Greene *et al.*, commenced in El Paso, Texas, about January 31, 1900, to recover copper matte where judgment went for defendants.

They further pleaded that defendant Greene originally owned the property in question, or had options to purchase the same; that he formerly executed an option to the defendant Mitchell as purchaser, for $250,000; that Mitchell assigned the option to the Cobre Grande Copper Company, which entered into possession and began to operate the mines; that in October, 1899, controversies arising between the Cobre Grande Copper Company and Greene, the latter entered into possession of the property, whereupon litigations arose concerning it; that a

majority of the stockholders of the Cobre Grande Copper Company pooled their stock for their protection and defense in these litigations, and made numerous contracts from time to time for the sale of that stock, which they placed in the hands of E. B. Gage, as trustee, and none of which contracts were carried out, the price named being $2.50 a share; that plaintiff Hallenborg and others were parties to said contracts as proposed purchasers; that the Cobre Grande Copper Company was embarrassed for money; that finally, the stockholders in the pool becoming restless and the defendant Greene offering to purchase the stock upon better terms than anybody else had offered, the defendant Gage, after consulting the directors and a majority of the stockholders, and with their approval, entered into the contract of December 12, 1900, which was subsequently ratified by the Board of Directors and the stockholders; that all of the stockholders except Hallenborg had ratified the contract and accepted the price; that the same was entered into in good faith, etc.; that the suits pending in New York are still pending; that the defendants have no information as to the disposition of the Mexican suit; and that the other suits referred to in the complaint have been dismissed.

The defendant Mitchell appeared by his attorney, R. E. Morrison, denied the material allegations of the complaint, and pleaded acquiescence of the plaintiff in the agreement of December 12, 1900.

The defendant, the Cananea Consolidated Copper Company, appeared by its attorneys, Barnes and Martin, and especially demurred on the ground that it was a Mexican corporation, and transacted no business in Arizona, and has no agent here.

The defendant Costello answered repudiating all intent to defraud in the agreement of December 12, 1900, on his part.

The *plaintiff replied* to these answers at considerable length, demurring to the whole and to certain parts thereof as insufficient; denying that these actions pleaded

as a bar were such in fact, or that the records contained the findings alleged; further stating that the judgments so pleaded as a bar were obtained by collusion and while defendant Greene was in control of both sides of the litigation.

Further Proceedings on the Record.—Injunction was granted April 11, 1901, prohibiting dismissal of suits, &c., by defendants and duly served (*Record,* pp. 90, 111).

Application by Addicks to intervene as plaintiff December 14, 1901, granted January 25, 1902 (p. 44). Trial May 12 to 15, 1902, at Prescott, Arizona, before Judge Sloan, without a jury. Decision September 18, 1902, in favor of defendants (see *Record Minutes,* p. 46; *Opinion, Trial Judge Sloan,* p. 47; *Judge Sloan's Findings,* p. 145; *Judgment,* p. 154).

Exceptions to findings were duly taken and noted (p. 155) and a motion for a new trial made by plaintiffs September 20, 1902 (p. 155), stating grounds thereof.

The motion for a new trial was denied October 28, 1902, during the same term and plaintiffs excepted (*Record,* pp. 154, 155).

An appeal was thereupon taken in open court to the Supreme Court of Arizona from the judgment and order denying a new trial (*Record,* p. 47). An assignment of errors on this appeal was filed (*Record,* p. 162).

On January 12, 1904, the appeal having been heard by the Supreme Court of Arizona, the judgment was affirmed (*Record,* p. 214).

On March 26, 1904, a motion for a rehearing was made to the Supreme Court of Arizona and denied.

On May 16, 1904, a special verdict containing the facts found by the Trial Court and the Supreme Court of Arizona was rendered by the latter Court and duly filed (*Record,* pp. 193-200).

On the same day, May 16, 1904, the assignment of errors was filed for the consideration of this Court (*Record,* p. 205) and an appeal taken to this Court (p. 215) and a citation issued and duly served (p. 216).

No serious Controversy as to the facts.—It will be seen from this résumé of the pleadings that there is no serious conflict as to the facts in this case, the controversy being confined to the legal inferences to be drawn from admitted or proven facts and the legal rights of the parties dependent thereon. It is admitted that the Cobre Grande Copper Company was in possession of the valuable mines and mining plant in question constituting its entire assets in the fall of 1899 and that Messrs. Greene and Mitchell, while officers, seized that property and turned it over to the defendant corporations, the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company and that actions were immediately brought to recover it; and that the abandonment of the claims of the Cobre Grande Copper Company and of those actions was secured by Greene and his corporations obtaining control of the management of the Cobre Grande Copper Company. All this appears from the pleadings. And the alleged defenses on the merits as pleaded are these: *first,* that Greene had a right to purchase the control of the Cobre Grande Copper Company and thus to cause these actions to be dismissed, and *secondly,* that the judgment of dismissal rendered in the main action of the Cobre Grande Copper Company against Greene and others in Maricopa County, Arizona, rendered four months after Greene had obtained control of the company, was really a decision upon the merits.

The plaintiffs claim that neither of these defenses are valid in equity and that on the undisputed facts the plaintiffs were entitled to relief.

Next comes the question of the character of the relief to which the plaintiffs were entitled, which was virtually all that was decided against the plaintiffs here, the Court below holding that the only practical relief was the appointment of a receiver, which in its discretion, it had the right to refuse, and did refuse, turning plaintiffs out of court.

It will be seen, therefore, that this appeal brings up really only a question of law, namely, the character of the relief, if any, to be given plaintiffs on the undisputed facts.

Findings of Fact in the Court Below.—The findings of Judge Sloan are printed on pages 145-153 of the Record, and they were adopted by the Supreme Court of Arizona in the form of a special verdict (see *Record*, pp. 193-200).

In substance the Court finds: (I) The incorporations and character of the parties as alleged; (II) the residences and ownership by plaintiffs of the stock and obligations of the company as alleged; (III & IV) the ownership of the mines in question by Greene in November, 1898; the transfer of the possession to the Cobre Grande Copper Company under certain contracts in return for 199,995 shares of its capital stock; the controversy between the Cobre Grande Copper Company and Greene over the right to possession; the forcible taking possession by Greene in October, 1899; suits in Sonora, El Paso, Texas, and in the State of New York by the Cobre Grande Copper Company to recover its property; a suit in Maricopa County, Arizona, No. 3437, by the Cobre Grande Copper Company against Greene, Mitchell, and the Phoenix National Bank to restrain the return to Greene by the bank of the title deeds to the property and for an accounting of the product of the mines and the value of its plant; the trial of that action and the dismissal of the complaint on April 15, 1901. (*This was after Greene's control.*) (V, VII, VIII.) (*There is no number VI*). That while this litigation was in progress there were various pooling arrangements by which a majority of the stock of the Cobre Grande Copper Company was put in the hands of the defendant Gage to sell at $2.50 a share; negotiations for the sale of the same to the plaintiff and otherwise, none of which had been consummated up to December 12, 1900; (VIII) that Gage, with the consent of the directors and majority of the stockholders undertook negotiations with Greene and made the agreement of December 12, 1900, for the sale to him of the majority of the capital stock of the Cobre Grande Copper Company for $2.50 a share, being the contract described in the complaint. The language of the Court is that "*there-upon said Gage took the matter up with said Greene and did on the 12th day of December, 1900, enter into*

"the contract of that date mentioned in the plaintiffs' original complaint filed in this action." The Court finds that the agreement was made in good faith by Gage and upon the advice of counsel that it could not successfully maintain its suit against Greene; and that Hallenborg protested against the transaction and refused to accept the price of his stock or to take part in the contract; (IX) that all the suits brought by the Cobre Grande Copper Company except those in New York have been dismissed before this action; that various sums outside of the purchase price of the stock amounting in all to $185,000 paid by Greene under this agreement of December 12th, 1900, were intended for the creditors of the Cobre Grande Copper Company and for distribution among its officers, attorneys and counsel as therein stated; (X) that the only property now left in possession of the Cobre Grande Copper Company is the money paid over under that agreement; (XI) that in consequence of the decision in the Maricopa County suit No. 3437, the injunctions granted in this action restraining the return of the title deeds to Greene have been dissolved, and therefore plaintiffs' remedy in that regard was gone and that *"there is "nothing before the Court except an application for the "appointment of a receiver"* (*Record*, p. 153).

From this statement of facts, as found by the Court below, it is clear that the plaintiffs' case on the facts is substantiated. True, the Court does not find whether or not the judgment of April 15, 1901, dismissing the action brought by the Cobre Grande Copper Company against Greene in Maricopa County, Arizona, to recover its property was or was not collusive; but it finds the fact that it was not rendered until over four months after Greene was *dominus litis* of both sides of the controversy; and it finds the agreement of December 12th, 1900, which provided for the dismissal of that action and the legal result is that the judgment must be described in equity as a collusive judgment and in no way binding upon the plaintiffs as stockholders of the Cobre Grande Copper Company.

Assignment of Errors for the Consideration of this Court.—The assignment of errors is found on pages 205-211 of the Record. They are twenty-one in number and present, in various forms, every point raised upon this appeal. To expedite the labor of the Court however, they may be reduced and classified as follows:

First, Second and Tenth: That the Court erred in receiving in evidence the judgments of the Maricopa County, Arizona, Court, and of the El Paso, Texas, Court, and in giving them any effect as against the plaintiffs in this action, said judgments being collusive and the plaintiffs not having been parties thereto.

Eighth, Sixteenth and Twentieth: That the Court below erred in failing to find the agreement of December 12th, 1900, fraudulent and illegal and void as to the plaintiffs.

Ninth, Twefth, Fourteenth, Fifteenth, Seventeenth: That the Court erred in failing to hold that a Receiver should have been appointed.

Seventh, Eleventh, Thirteenth and Eighteenth: That the Court erred in not giving the relief demanded in addition to the appointment of a Receiver.

Fifth: "The Court erred in failing to reverse the "judgment appealed from for the error of the Trial "Court in permitting E. B. Gage, over the objection of "appellants, to answer the following question while on "the stand testifying on behalf of himself and other ap-"pellees, to wit: Q. Referring to the agreement of De-"cember 12, 1900, will you state what the amount of "twenty-five thousand ($25,000) dollars and the two "amounts of thirty thousand ($30,000) dollars therein "mentioned, making eighty-five thousand ($85,000) dol-"lars was for? for the reason that said contract is un-"ambiguous and speaks for itself, and that the question "called for a conclusion of the witness."

Twenty-first: That the Court erred in refusing to make a full statement of the facts, the findings of the lower Court being incomplete and partial.

Third, Fourth and Sixth: Were objections to the admission of certain papers in connection with the pooling agreements, which do not appear to be vital on this appeal.

Nineteenth: A question of practice not important at this stage.

The above assignment of errors and the reasons therefor are stated in detail and at length upon the record.

The Facts chronologically stated.—In November, 1898, the defendant William C. Greene was the owner of a number of valuable copper mines in the District of Cananea, State of Sonora, Republic of Mexico, and on November 26th, 1898, he made a contract intending to sell them to the defendant George Mitchell, for $250,000, of which the sum of $12,500 was to be paid down in cash by Mitchell and the balance was to be paid in instalments, of which the first instalment of $37,500 was to be paid on November 26th, 1899, and the other payments subsequent thereto (*Finding*, p. 147).

This contract granted to Mitchell the right and permission to enter upon and take possession of the properties and every part thereof, and to work and operate the same and to extract, ship and treat the ores thereof and Mitchell on his part agreed to erect on the premises a smelting furnace with such appliances as he might deem best for operating the same. Greene agreed to warrant and defend the title. The contract also provided that in case Mitchell failed to make any of the payments provided for, that then the contract should be null and void and the property and plant thereon should revert to Greene (*Record*, p. 102).

In order to insure the carrying out of this contract on the part of Greene, deeds dated November 26, 1898, conveying the title of the property to Mitchell were duly

FOURTH POINT—The judgment entered in the suit in the District Court in Maricopa County was collusive and void and the Court below erred in giving any force or effect to it..... 43

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IN THE

Supreme Court of the United States.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants, AGAINST COBRE GRANDE COPPER COMPANY, *also* E. B. GAGE, W. M. ADAMSON, JOHN H. COSTELLO, J. HENRY WOOD and CON O'KEEFE, its Directors, *also* WILLIAM C. GREENE and GEORGE MITCHELL, PHŒNIX NATIONAL BANK, of Phœnix, Arizona, CANANEA CONSOLIDATED COPPER COMPANY and GREENE CONSOLIDATED COPPER COMPANY, Respondents.	October Term, 1905, No. 87.

BRIEF FOR PLAINTIFFS AND APPELLANTS.

Statement of the Case before this Court.—This is an appeal by the plaintiffs from a judgment of the Supreme Court of the Territory of Arizona, rendered January 12, 1904, affirming a judgment in equity of the District Court

of the Fourth Judicial District of Arizona dated September 18, 1902, rendered by Mr. Justice Sloan, Trial Justice at Prescott, after a trial before him without a jury; which judgment dismissed the complaint, dissolved an injunction previously obtained *pendente lite*, and denied plaintiffs' application for a Receiver, with costs of the action.

The Trial Court made numerous findings of fact which were afterward adopted by the Appellate Court (*Record*, pages *193-200*).

This is a minority stockholder's and creditor's action brought originally by Axel W. Hallenborg as holder of 8,617 shares of the Cobre Grande Copper Company, an Arizona corporation, and also as creditor of said corporation for advances to the amount of $39,080.25, as declared in the bill of complaint, but to the amount of $50,005, as proved on the trial. The plaintiff Addicks, owning 5,000 shares, was allowed to intervene on the trial, and adopted the complaint of Hallenborg as his own.

The ground of complaint, as alleged, was, in substance and briefly, that the Cobre Grande Copper Company was, in 1898 and 1899, in possession of valuable mines in Cananea, in the State of Sonora, Mexico, and that Greene and Mitchell, then officers of the Company, did, in October, 1899, oust the Company from its lawful possession of the mines, turn them over to the defendants, the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, both controlled by Greene. That these acts being challenged by the Cobre Grande Copper Company, suits were begun in its behalf in 1899 and 1900, in the Third District of Arizona (Maricopa County) and elsewhere, with the object of recovering its property from Greene, Mitchell and these corporations; and that pending these suits and on December 12, 1900, Greene, individually and on behalf of said corporations, bought up a majority of the stock of the Cobre Grande Copper Company, subsidized its officers, attorneys and counsel, procured a collusive decision of the main Maricopa County case in his favor and a dismissal of the other cases, thus virtually destroying the value of the plaintiffs' Cobre Grande stock, and render-

ing valueless Hallenborg's claim against the Company for his advances.

The plaintiffs asked that a Receiver of the Cobre Grande Copper Company be appointed, and for an injunction, accounting and other appropriate relief, including the right to intervene and be heard in the pending suits brought by the Company against Greene and others as aforesaid.

Plaintiffs' main allegations of fact were not seriously controverted in the pleadings or on the trial, and are mostly supported by the findings of the Court below. The legal inferences therefrom were, of course, strenuously denied by defendants and will be the subject of discussion on this appeal.

The complaint was dismissed apparently on the ground that the Cobre Grande Copper Company having no property left, and the collusive judgment rendered against it in Maricopa County being a bar to the recovery thereof, a Receiver would be useless and unnecessary; that plaintiffs' remedy was by a direct action by plaintiffs themselves and not through a Receiver (*See Trial Judge Sloan's opinion, p. 56*).

On appeal duly taken by plaintiffs to the Supreme Court of Arizona the judgment of dismissal was affirmed, a motion for a rehearing was denied and special findings were made adopting those of Trial Justice Sloan.

Substance of the Pleadings.—The *complaint,* as amended, alleged the incorporation of the various defendant corporations, that the defendant Gage was director and president of the defendant Cobre Grande Copper Company; and that the defendants Adamson, Costello, O'Keefe, and Wood, were also directors; that the Cobre Grande Copper Company is an Arizona corporation with a capital stock of five hundred thousand dollars ($500,000) divided into 200,000 shares at $2.50 each;

That defendant Greene is president of the Greene Consolidated Copper Company, a West Virginia Corporation; and

That plaintiff Hallenborg is a creditor of the defendant Cobre Grande Copper Company to the amount of $40,000 and upwards; and a stockholder, holding 8,000 shares and upwards.

That prior to January 1, 1900, the Cobre Grande Copper Company had been engaged in a series of litigations with the defendants, Greene, Mitchell, and their associates, which litigations, and the claims and allegations of the Cobre Grande Copper Company relating thereto, are set forth at length in the complaint, in substance as follows:

That in the fall of 1899, the Cobre Grande Copper Company was in possession of certain valuable mining properties in the Cananea Mountains, in Sonora, Republic of Mexico; that Greene and Mitchell were at that time directors of the Cobre Grande Copper Company and unlawfully obtained possession of said mines about October 11, 1899, and turned them over to the Cananea Consolidated Copper Company, and through it, to the Greene Consolidated Company; and thereupon that various actions and proceedings were taken on the part of the Cobre Grande Copper Company, to gain possession of said property; namely: an action in the Third District of the Territory, to prevent Greene from getting possession of the title deeds; a proceeding in Mexico to recover the property itself; and suits in New York and El Paso to recover some of the copper matte, etc., all of which suits and actions were meritorious, and brought in good faith for the benefit of the Cobre Grande Copper Company.

The complaint further shows that just prior to December 12, 1900, defendant Greene and the Greene Consolidated Copper Company for the purpose of getting rid of this litigation devised a scheme to get control of the Cobre Grande Copper Company, and thereupon entered into a corrupt agreement with the defendant Gage, who was then president of the Cobre Grande Copper Company, for that purpose. The details of this agreement which was in writing are set out in the complaint, and they amount to this: That Gage, holding at that time

a large amount of the stock as trustee of certain stockholders, agreed to turn over the stock itself and the control of the Corporation to Greene, and the Greene Consolidated Copper Company, and to discontinue all of the suits and actions aforesaid, to deliver unto Greene the copper matte in controversy, and to himself resign and procure the resignations of his co-directors. No consideration whatever accrued to the Cobre Grande Copper Company under this agreement, but large personal benefits and advantages were to be received by Gage and Costello, both of whom were directors of the Company.

This mining property constituted substantially the entire property of the Cobre Grande Copper Company.

There were various other allegations and complaints incidental to these main charges, and intended to illustrate and connect them.

The *prayer* of the complaint is that the Cobre Grande Copper Company and its officers be enjoined from discontinuing these suits; and that a mandatory injunction be issued requiring them to prosecute the same; that plaintiff be allowed to intervene therein to protect his rights; that the defendant directors and officers be removed; and that a receiver be appointed to protect the property of the Cobre Grande Copper Company, and prosecute the claims aforesaid, etc.

The *relief* demanded against Greene and Mitchell was that they be restrained from demanding certain documents, evidence of the title to the disputed properties; and that they be required to account for the product of the mines and other property appropriated by them, with other relief unnecessary to detail here.

Substance of the Answers.—The defendants, Greene and the Greene Consolidated Copper Company, and the Cananea Consolidated Copper Company, appeared by Barnes and Martin and demurred on the ground that the complaint was multifarious, and that the plaintiff has a remedy at law and that the Court has no jurisdiction.

Further answering, the said defendants deny that the plaintiff is a stockholder and creditor, and say there was

Greene was to get 115,000 shares of the Cobre Grande stock held by Gage as trustee, being the stock in the pool or combination aforesaid, for $2.50 a share, payable in installments in about ninety days;

The copper matte in litigation in New York, or the proceeds thereof, were to be turned over by the Cobre Grande Copper Company to Greene and his company;

All the suits pending between Greene and the Cobre Grande Copper Company were to be dismissed or discontinued;

The directors of the Cobre Grande Copper Company were to resign;

Mr. Gage, in addition to the price of his own stock included in the pool, was to receive three sums of money, namely, $25,000, $30,000 and $30,000, in all $85,000; and 10,000 shares of stock of the Greene Consolidated Copper Company, whereof 5,000 shares (worth $50,000) were to be for his own use and benefit, and 5,000 more were for the use and benefit of Chalmers and others, attorneys for the Cobre Grande Copper Company in the Territory of Arizona;

Mr. Costello, who also was director of the Cobre Grande Copper Company, was to be satisfied by the surrender of a promissory note of $23,000, previously given by him to the Company;

Any of the stockholders in the pool might withdraw from this agreement so long as 51,000 shares were transferred to Mr. Greene, that evidently being supposed to be sufficient, in addition to what he already had, to vest the practical working control in his hands.

This agreement was swiftly carried into effect and pursuant thereto and at a meeting of the Board of Directors the following took place, as appears by the minutes in evidence:

> "Upon motion of Mr. Adamson, seconded by "Mr. O'Keefe, the following resolution was "adopted, namely:
>
> "RESOLVED, That William C. Greene be ap- "pointed agent of the Cobre Grande Copper Com-

"pany for it and in its name, to transact any and "all business of and on behalf of this Company, "and particularly to control and direct every and "all suits pending in the State of New York in "which this Company is a party; to discharge and "employ attorneys; to receive and receipt for "every and all assets of the Company; and to dis- "charge, adjust and satisfy every and all claim or "claims against it; to begin and prosecute or dis- "miss any suit or proceeding he may deem neces- "sary for the benefit of said Company" (*Record*, p. 90).

Effect of the Fraudulent Agreement.—Now, the result of this agreement was to destroy the rights of the plaintiffs Hallenborg and Addicks as follows:

First.—Plaintiffs had a right as stockholders in the Cobre Grande Copper Company to require that it should continue in the business of mining, as far as possible. They not only ha dan interest in its property, but in its franchise contained in its charter, obtained from the Legislature;

Second.—Plaintiffs had a right to the honest and faithful services of the directors of the Cobre Grande Copper Company, as their trustees; or that they should resign their offices; and they were deprived of that right because, instead of resigning, they turned the control of the company over to hostile hands;

Third.—Plaintiffs were entitled to the fair and unbiased judgment of the trustees in any dealings with other parties, and especially in a matter of this moment affecting the very life of the organizaton; and of that right they were deprived by the conduct of the trustees in accepting pecuniary benefits from Greene as a part of the consideration of a contract affecting the corporation;

Fourth.—They were entitled to have the offices of the corporation filled by officials acting in its interest; and

of that right they were deprived, and the offices were occupied by persons hostile to its interests;

FIFTH.—They were entitled to share in the property of the corporation; and that was disposed of without consideration; or for an utterly inadequate and secret consideration, not appearing at all in the open and written agreement submitted to them as the real agreement;

SIXTH.—They were entitled to have the officers chosen by fair appointment or election; and here the offices were bartered away for fraudulent consideration;

SEVENTH.—They were entitled to full knowledge of every act of the directors and they were deceived by a concealment of secret provisions with reference to $60,000 paid by Greene.

In every one of these respects, plaintiffs as stockholders and *cestuis que trust* of the Cobre Grande Copper Company were defrauded of their legal and moral rights.

No doubt Mr. Gage and each of the stockholders of the Cobre Grande Copper Company had a right to sell his stock to Mr. Greene or anyone else for any price he or they might see fit; but they had no right to enter into conspiracy and form a combination for the purpose of selling that stock in such a way as to vest control in parties hostile to the corporation.

No doubt the directors of the Cobre Grande Company had a right to resign their offices; but they had no right to enter into a combination with a view to resigning as a part of a bargain to transfer control to persons notoriously hostile, and engaged in actlve litigation with the company.

When these officials determined to sell out their stock in the company to a hostile interest, and especially when they determined to sell that stock by means of a combination for that purpose, they should have first resigned their offices as trustees. The moment they *conceived* that scheme of transfer to Greene that moment they became incompetent to serve as trustees for the other stock-

holders; they became, as it were, traitors to the corporation. Its interests and their own were distinct and hostile from that moment, and it was their duty at once and at the very inception of negotiations of that character, to resign their respective offices and allow the corporation to choose servants and agents who would act in its behalf with zeal and fidelity.

The fraud, therefore, in this case, originated at the moment that the directors as such began to traffic with Mr. Greene as managers or agents of a combination to put him in power. They were no longer competent to act as agents for Hallenborg.

The moment when an attorney or any fiduciary agent begins to traffic with the adversary of his principal with a view to the furtherance of his own interests as distinct from those of his principal, that moment he ceases to be competent to act in good faith for his principal.

These directors seem to have lost sight of the fact that this corporation was their principal, and had an existence entirely apart and separate, not only from that of each of them but from that of all of them, or of any combination which they could possibly form.

Authorities showing that the agreement of December 12, 1900, showed on its face a breach of trust.—In this very controversy the only Court which has yet passed on the merits has condemned this agreement in strong terms. In *Hallenborg* v. *Greene*, 66 Appellate Division Reports, N. Y. Supreme Court, 590, 595, the Court on appeal in affirming an order sustaining an injunction granted against defendants on similar facts characterized this contract as fraudulent and held that plaintiff was entitled to such relief as the New York Courts could grant, including a receiver within that State and an injunction.

The case of *Saranac and Lake Placid Railroad Company* v. *Arnold*, 167 N. Y., 368, the Court of last resort in the State of New York says (p. 374):

> "While the defendants owned substantially all "the stock, they did not own the corporation itself.

> "It was not their chattel, but was a distinct legal "entity with the right to own property, and they "could not appropriate its property to its own use "any more than any other agent or trustee can "appropriate the property of his principal. "Through their voting power they could manage "and control its affairs, but only as trustees, and "they were bound to observe the rule of *meum et* "*tuum*, and be as true to the corporation as if they "had sustained the same relation to an indi- "vidual."

And when Gage and Costello agreed to take money from Greene in this transaction, they were no longer competent to act as agents for Hallenborg or Addicks or any other stockholder of the corporation who chose to repudiate their act. Costello took the surrender of a note held by the Company against him without any reason whatever, so far as appears, and he was a director of the Company, and is a defendant here. Gage took $50,000 for himself besides $85,000 which he claims to be part of a secret trust yet unexplained and unaccounted for. Laying aside the question of the $85,000 (and that transaction, too, being a secret one, was fraudulent), yet the acceptance of the $50,000 or of any sum whatever for his personal use, or the mere consideration of such an offer, rendered him incompetent to act as trustee for the stockholders.

Nor could the directors vote Gage any sum whatever for back salary.

> *Bennett* v. *St. Louis & C. Co.*, 19 Mo., app. 349.

Human nature is such that it is a necessary presumption that the serious consideration by any official of an offer of $50,000 to be paid him as a part of a contract between his principal and a third party, renders him incompetent to act intelligently and zealously in the interest of his principal. Neither law nor equity ever

tolerates for a moment such trifling with a man's duties as is implied in such a bargain.

This case cannot be distinguished from *Menier* v. *Telegraph Works* (9 Ch. App., 350). In that case a bill was filed by a stockholder on behalf of himself and all other shareholders against the European Company, in which he was a shareholder, Hooper's Telegraph Works and two of the directors of his own company, for the purpose of preventing the carrying out of a resolution for the winding up of the European Company and for the abandonment of a pending suit involving the ownership of a valuable concession claimed to have been granted to one Baron de Mana in trust for the European Company. It was charged that these resolutions were adopted through the influence of Hooper's Company and by the vote of directors elected by the shares owned by Hooper's Company in the European Company, said company owning an absolute majority. It was also charged that the abandonment of the pending suit and the resolution to wind up were prejudicial to the interests of the European Company and to the advantage of Hooper's Company and to enable Hooper's Company to accomplish purposes of its own. It was *held* that the bill stated a good cause of action. The Court said

> "The case made by the bill is, very shortly, this: "The defendants who have a majority of shares "in the company have made an arrangement by "which they have dealt with matters affecting the "whole company, the interest in which belongs to "the minority as well as to the majority. They "have dealt with them in consideration of their "obtaining for themselves certain advantages. "Hooper's Company have obtained certain advan- "tages by dealing with something which was the "property of the whole company. The majority "has divided the assets of the company more or "less between themselves to the exclusion of the "minority. I think it would be a shocking thing "if that could be done, because, if so, the majority

to get control of this stock for the purpose of pressing the company's claims (*Findings V and VII*, pp. 148, 149).

William C. Greene and the Greene Consolidated Copper Company then undertook to stop the litigation against them by getting control of the Cobre Grande Copper Company, and their efforts resulted in a contract, dated December 12th, 1900 (*In Evidence*, p. 105; see *Finding*, p. 150). This contract, which was made between William C. Greene and the Greene Consolidated Copper Company on one hand and E. B. Gage, president of the company, and trustee for the stockholders, and the Cobre Grande Copper Company on the other, was to the following effect: Gage agreed to sell this stock at the rate of $2.50 a share and to deliver at least 51,000 shares, that, presumably being the amount which Greene and his associates still needed to obtain control of the Cobre Grande Copper Company. It was also agreed that Gage should have for his personal benefit 5,000 shares of stock of the Greene Consolidated Copper Company, worth $50,000; that the attorneys for the Cobre Grande Copper Company should also have 5,000 shares of stock and that there should also be paid to Gage sums of $25,000 and $30,000 and delivered to him 3,000 shares of the stock of the Greene Consolidated Copper Company, worth $30,000.

In all $185,000 in stock and cash was thus to be distributed.

Upon these payments being made it was agreed that the directors of the Cobre Grande Copper Company should resign, so that Greene might take possession of the company by his representatives.

It was further provided that John H. Costello, one of the directors, should have delivered up to him his note for $23,000, which was held by the Cobre Grande Copper Company.

It was further agreed that the various suits pending between the Cobre Grande Copper Company and Greene and his associates should be dismissed.

This contract is described in the complaint (pp. 7, 8 & 9), is in evidence (p. 105, *Plff's Ex., 3*), and is referred to in the Findings as follows:

"Thereupon said Gage took the matter up with "said Greene and did on the 12th day of December, "1900, enter into the contract of that date men- "tioned in the plaintiff's original complaint filed "in this action" (*Finding VIII*, p. 150).

The making of this contract having become known to Hallenborg, he brought this action and obtained April 11, 1901, from Judge Sloan a preliminary injunction prohibiting the carrying out of the agreement (*see Injunction*, p. 111), and it was served April 13, 1901 (*see Return*, p. 90).

At the time this injunction of Judge Sloan was served the final payments for the stock had been made by Greene, the stock had been transferred to him, the old directors of the Cobre Grande Copper Company had resigned and their places had been filled by Greene and his associates, and Greene had become president of the Cobre Grande Copper Company, all as provided for by the agreement of Deccember 12, 1900, so that he then controlled both sides of the litigation, but found it impossible to dismiss the suit in Maricopa County on account of Judge Sloan's injunction. Thereupon a judgment collusive, as we claim was entered up April 15, 1901, in the suit dismissing the complaint in the Maricopa County suit and directing the delivery to Greene of the escrow papers held by the Phœnix Bank (*see Judgment*, p. 118; *Finding*, p. 147).

On the return of Judge Sloan's temporary injunction Greene's counsel, exhibited this collusive adjudication by Judge Street respecting the delivery of the deeds by the Phœnix Bank, and Judge Sloan therefore dissolved the injunction so far as it restrained the delivery of the deeds by the Phœnix Bank (*Finding* XI, p. 152).

After several adjournments this case came on for hearing and was tried before Judge Sloan in May, 1902. In the meantime Mr. Addicks had become a party plaintiff by intervention, as the holder of 5,000 shares of stock of the Cobre Grande Copper Company.

In September, 1902, Judge Sloan rendered his decision in which he held in substance that there was nothing up-

on which an injunction could act at that time, and that therefore the suit was simply one for the appointment of a receiver of the Cobre Grande Copper Company; that there was doubt as to whether the Court had power to appoint a receiver of the corporation under the circumstances disclosed by the proofs, and that he would refuse to appoint a receiver, more especially since every relief which the plaintiffs were entitled to under the facts alleged by them could be obtained by them in an action brought by them directly (*see Finding,* p. 153).

On appeal the Supreme Court of Arizona took the same view.

From the affirmance of that judgment this appeal is taken.

FIRST POINT.

THE AGREEMENT OF DECEMBER 12, 1900, AND ALL ACTS OF DEFENDANTS IN PURSUANCE THEREOF WERE IN VIOLATION OF PLAINTIFFS' RIGHTS AND ENTITLE THEM TO RELIEF IN EQUITY.

The situation on December 12, 1900, was this: Hallenborg was a stockholder in the amount of 8,000 shares, and a creditor for a large amount. Addicks was a shareholder in the amount of 5,000 shares. The corporation was engaged in a struggle for its existence. It was a party to numerous litigations in Arizona and elsewhere, resulting from its endeavor to regain possession of mining property of enormous value, variously estimated at from one to fifty millions of dollars, situated in Sonora, Mexico. The claim thereto constituted all its assets. Mr. Greene, the adversary in these litigations, was in possession of that property under a hostile claim, either individually or as president of the Greene Consolidated Copper Company, a rival mining corporation. During the year 1900, there had been formed a pool or combination of the stockholders to raise money to carry on these litigations on behalf of the Cobre Grande Copper Com-

pany against Greene. Hallenborg had been a party to that combination with the intention of ultimately purchasing, if possible a majority of the Cobre Grande stock; and he had advanced $40,000 to aid in these litigations and incidentally of course for the benefit of himself and the other stockholders. No doubt it was supposed that if this stock could be kept together in this combination and the litigation prosecuted, there would be a prospect, as soon as success dawned upon their efforts, of selling this pooled stock to either Hallenborg or his associates who were interested with him in advancing this money. It was no doubt further supposed that the money to prosecute the litigation could be much more readily borrowed on the strength of the combination of stockholders than in any way then feasible under the circumstances.

This effort and arrangement was not only lawful but commendable in the interests of the Cobre Grande Copper Company. The stockholders had a right to combine to raise the money to prosecute the litigations to recover their property and the Company had a right to borrow money for that purpose from its stockholders, and it was its duty to do so, if possible, in view of the large interests involved, compared with the amount disbursed in the litigation. No doubt it was the intention of Hallenborg and others to get a controlling interest in the corporation, and this was also laudable, since it was their intention, having obtained this power, to further the interests of the corporation by recovering its property, not only for the benefit of themselves but for the benefit of the other stockholders. If some one had not come to the aid of the corporation and loaned it money to press its claim for restitution of its property, the stock of the Company would have been valueless.

The Pooling Agreements.—The various pooling agreements between Gage, Orne, Knox and others are dated January 5, 1900; March 30, 1900; June 2, 1900 and November, 1900. The first three are substantially the same and provide for the holding of the stock by a trustee, the same to be sold at $2.50 a share to Chalmers, attorney

for the Cobre Grande Copper Company, who is described therein as agent. In the agreement of March 30, 1900, and also that of June 2, 1900, it is provided that Chalmers should advance to Gage such amounts as he might require to use to pay the obligations of the Company, the expenses of operating its property, and legal expenses. In case Chalmers succeeded in getting the money to buy the stock represented in the pool, the resignations of the present officers were to be handed in in order, of course, that a new election might be had and officers having the confidence of the purchasers of the stock, elected. If Chalmers were unable to complete the purchase by a certain date, the agreement should fail.

On November, 1900, a new agreement was proposed of similar character, which recites the litigations pending between Cobre Grande Copper Company and Greene, describes the property, and gives an option to Costello and Hallenborg of obtaining the stock. This agreement also provides for paying the debts of the corporation, amounting to many thousands of dollars therein set out, and for the expenses of the litigation, and the running expenses of the Cobre Grande Copper Company. As a part of these negotiations and schemes for raising money, power was given to Gage to sell the stock placed in his hands, or any part thereof "on such terms and conditions as he may deem advantageous to our interests." This agreement was dated October 24, 1900, and was signed by numerous stockholders, including Grant R. Bennett, who undertook to sign for Mr. Hallenborg, holding a written power of attorney from him (*Record*, p. 136).

Legal Effect of the Pooling Contract.—The parties to these pooling contracts including plaintiff had a right to rely on the trustee Gage, that the pool or combination would be used to benefit, not to defeat or destroy the interests and prospects of the corporation. For the stockholders who became a party to this combination, controlling a majority of its stock, became to some extent and for some purposes the corporation itself, and as-

sumed the trust relation of the corporation to its other stockholders. They were bound to act for its best interests; and such a combination or its managers could not any more than its formally elected trustees do any act whereby a profit should be made out of the corporation at the expense of the minority stockholders; and any such act would be a constructive fraud upon such minority stockholders.

> *Erwin* v. *Oregon Railroad and Navigation Company,* 27 Fed. Rep., 630.

That a majority combination of stockholders becomes a trustee for the minority is well settled.

> *Meeker* v. *Winthrop Iron Co.,* 17 Fed. R., 48.
> *Jackson* v. *Ludeling,* 21 Wallace, 616.
> *Farmers' L. & T. Co.* v. *N. Y. & Northern R. R. Co.,* 150 N. Y., 410.
> *Barr* v. *N. Y., L. E. & W. R. R.,* 96 N. Y., 444.
> *Gamble* v. *Q. C. W. Co.,* 123 N. Y., 91.
> *Menier* v. *Hooper's Tel. Works,* L. R., 9 Ch. App., 350.

The Fraudulent Agreement of December 12, 1900.—Such was the situation upon December 12, 1900, except that, at about that time, Greene and his attorney, Logan, of New York, with hostile intent, were actively engaged in Phœnix and Prescott in endeavoring to get control of sufficient amount of the stock of the Cobre Grande Copper Company to secure a majority so as to defeat the claims of the company against themselves.

Then it was that Gage entered into negotiations with Greene, which finally resulted in the agreement of December 12, 1900 (*Record,* pp. 105-108).

This agreement, which was executed by the Greene Consolidated Copper Company, represented by Greene, its president, on the one part, and by the Cobre Grande Copper Company, represented by Gage, its president, upon the other part, and by Greene and Gage personally, provided as follows:

executed by Greene and deposited, together with a written agreement relating thereto with the Phœnix National Bank of Phœnix, Arizona, to be delivered to Mitchell upon payment by him of the full purchase price, or in case he should default in the contract and his rights thereunder become forfeited, then the deeds were to be returned to Greene (*Record*, p. 103). After the making of the contract, Mitchell took possession of the mines and commenced to develop and improve them, and in May, 1899, in connection with the defendant Greene, organized the Cobre Grande Copper Company, and Mitchell, with the consent of Greene, transferred to it all his rights under the contracts to the mines and property connected therewith in return for 199,995 shares of its capital stock (*Finding* IV., p. 147).

On July 22nd, 1899, Greene made a supplemental contract with the Cobre Grande Copper Company acknowledging and ratifying the transfer to it of the rights of Mitchell under the contract and agreed to execute further assurances (*Record*, p. 103).

While the Cobre Grande Copper Company was proceeding with the working of the mines and before any payment had become due and on October 11, 1899, Greene took possession of the mines and turned out the Cobre Grande Company (see *Finding* IV., p. 148).

After Greene had taken possession of the property he organized a corporation known as the Cananea Consolidated Copper Company under the laws of Mexico, composed of himself and one Norton Chase, his attorney, as sole incorporators, and made a deed to this company of the whole property. This Cananea Consolidated Copper Company was formed for the purpose of holding title to the mines. All the stock of the Cananea Consolidated Copper Company, however, was immediately transferred to the Greene Consolidated Copper Company, a West Virginia corporation, of which William C. Greene was president (*see Finding*, p. 146), which went on with the working and development of the mines. These facts are all alleged in plaintiffs' bill of complaint and not denied by the answers or otherwise.

All this occurred prior to November 26th, 1899, when the first of the deferred payments under the Mitchell-Greene contract fell due.

As soon as Greene had got into possession of the property, he claimed that unless the payment of $37,500, which became payable on November 26th, 1899, was made punctually on that day, all the rights of the Cobre Grande Company under that contract would become forfeited, and that he would then be entitled to receive from the Phoenix National Bank the title deeds which had been placed in escrow. Thereupon Cobre Grande Copper Company on November 25th, 1899, brought a suit in the District Court of Maricopa County to restrain the delivery of the deeds to Greene and an adjudication of their rights under the contract, the company claiming that Greene could not enforce any forfeiture under his contract as long as he had violated the conditions of it on his own part, by ejecting the company from the property and refusing to allow them to work and develop it. In this action in Maricopa County a preliminary injunction was granted by Judge Street, November 25, 1899, and after argument was retained by him (*see exhibit injunction, Record,* p. 93; *decision continuing same,* pp. 111-117; *Finding,* p. 195).

The Cobre Grande Copper Company also brought suits in New York and in Texas to replevy matte made from ores taken from the mines, and proceeded before the Courts of Mexico to obtain restitution of the mines themselves (*see Findings, IV and IX,* pp. 148, 151).

In October, 1900, the Maricopa County suit came on for trial before Judge Street, and after the hearing his decision was reserved (*Finding,* p. 147; *Judgment Roll,* pp. 111-118).

Meantime in 1900 various pooling arrangements were entered into whereby a majority of the stock of the Cobre Grande Company was put in the hands of one E. B. Gage (afterwards president of the company) as a trustee to hold the same, together with the object of raising money thereon to prosecute these litigations either by sale of the stock or otherwise. Hallenborg endeavored with others

"make those funds trust funds which in other "circumstances are as much the absolute property "of the corporation as any man's property is his."

BRADLEY, *J.*, in *Graham* v. *LaCrosse & M. R. Co.*, 102 U. S., 148, 161.

See also

Mellen v. *Moline Iron Works*, 131 U. S., 352.
Chicago M. & St. P. R. Co., v. *Third Nat. Bank*, 134 U. S., 276.
Wabash, St. L. & P. R. Co. v. *Ham*, 114 U. S., 587, 594.
Morgan County v. *Allen*, 103 U. S., 498, 509.
2 Story Eq. Jur., Sec. 1252.
1 Perry on Trusts, Sec. 242.

THIRD POINT.

THE COURT BELOW HAD POWER TO APPOINT A RECEIVER OF THE COBRE GRANDE COPPER COMPANY AND UPON THE FACTS PROVED IT WAS ITS DUTY TO DO SO.

The opinion of Judge Sloan shows that his refusal to appoint a receiver was founded largely upon his doubt of the power of the Court. He says (p. 56):

"* * * In the view of the Court there is sufficient doubt of the power of the Court to appoint "a receiver where no other relief is asked for, or "can be granted under the pleadings or facts to "cause it to hesitate before exercising its discretion and appointing such a receiver and to be "satisfied that no other remedy is available to "plaintiffs for the preservation of their rights as "minority stockholders."

The Supreme Court of Arizona held without deciding the question of power that to refuse to appoint a receiver was a wise exercise of discretion (p. 173).

In the State of New York, on the other hand, the Supreme Court at Special Term appointed a receiver in a similar action brought by Hallenborg and the power and duty of the Court to do so was affirmed by the Appellate Division of the Court.

The Court there said:

> "It needs no refinement of the decisions to show "that the case thus presented is one for equitable "cognizance. Within all of the authorities, a "court of equity in the proper jurisdiction should "intervene under such circumstances for the pro- "tection of the stockholders and creditors, both by "injunction and by the appointment of a receiver "to represent the company, since the directors, by "thus grossly abusing their trust, have become dis- "qualified to act. (*Treadwell* v. *United Verde* "*Copper Co.*, 47 App. Div., 613; *Pondir* v. *N. Y.*, "*L. E. & W. R. R.*, 72 Hun, 384; *Fennessy* v. *Ross*, "90 Hun, 298, 5 App. Div., 342; *F. L. & T. Co.* v. "*N. Y. & N. R. Co.*, 150 N. Y., 410, 425, 430; *Sar-* "*anac & Lake Placid Ry. Co.* v. *Arnold*, 167 N. Y., "368, 374; *Pierson* v. *Concord R. Co.*, 62 N. H., 537; "*Wayne Pike Co.* v. *Hammons*, 129 Ind., 368; "*Haywood* v. *Lincoln Lumber Co.*, 64 Wis., 639; "*Miner* v. *Belle Isle Ice Co.*, 93 Mich., 97; *Menier* v. *Hooper's Telegraph Works*, Law Rep., 9 Ch. "App., 350; *Beach on Receivers*, 2d ed., sec. 86; "*Cook on Corporations*, vol. 2, secs. 650, 662, vol. "7, sec. 8269; *Perry on Trusts*, sec. 427)."
>
> *Hallenborg* v. *Greene* (decided December, 1901), 66 N. Y., App. Div., p. 596.

There is not in the State of New York, any more than in the Territory of Arizona, any special statute authorizing a court of equity to appoint a receiver of a corporation for the fraud or mismanagement of the directors, and the appointment in New York was made under the general power of the Court conferred by its general jurisdiction in law and equity.

The Arizona Court has the same powers as every court of equity throughout the country. Jurisdiction in equity has been specially conferred upon it by the organic law of Arizona, it being provided by the United States Rev. Stat., §1868, that:

> "The Supreme Court and the District Courts "respectively of every territory shall possess "chancery as well as common-law jurisdiction."

Nor is there in the Arizona statutes anything to restrict the power of the court to grant a receiver in a case like this.

The statute provides (§1532, Revision 1901) that:

> "Judges of the District Court in term time or "in vacation may appoint a receiver in suits pend- "ing in said courts, when no other adequate rem- "edy is given by law for protection and preserva- "tion of property or the rights of parties therein "pending litigation in respect thereto."

And by §1541:

> "In all matters relating to the appointment of "receivers and to their powers, duties and liabili- "ties and the powers of the Court in relation there- "to the rules of equity shall govern whenever the "same are not inconsistent with the provisions of "this title."

All the text writers recognize the power of a court of equity to appoint a receiver of a corporation in case of fraud or mismanagement of directors.

In *Foster's Fed. Prac.* (2nd. ed.), p. 397, it is said:

> "Independently of statutory authority, a court "of equity will ordinarily appoint a receiver of the "property of a corporation in only seven cases. "* * * Thirdly. At the suit of persons inter-

"ested, whether as stockholders or creditors, in the "property where there is a breach of duty by the "directors and an actual or threatened loss."

In *Beach on Receivers* (2nd ed.), §86, it is said:

"The courts have not the power to appoint re- "ceivers to wind up the affairs of corporations, in "the absence of statutory provisions, but if the "property of a corporation is being mismanaged "and is in danger of being lost to the stockholders "and creditors through collusion and fraud of its "officers and directors, or mismanagement and "waste, courts of equity have inherent power to "appoint receivers."

In *Gluck & Becker on Receivers of Corporations*, §9, it is said:

"The inherent power of a court of equity to "appoint a receiver of the property of a corpora- "tion at the instance of one or more stockholders, "charging fraud and mismanagement on the part "of the officers in charge to the imminent danger "of the interests of such stockholders, is now too "well settled to admit question."

Earle v. *Seattle, L. S. & E. R. R. Co.* (56 Fed. Rep., 909), was an action by minority stockholders to annul a contract entered into in the name of the corporation with another railroad company. A majority interest in the stock of the railroad company had been purchased by a competitor, which thereby secured the control of the Board of Directors who then executed a traffic agreement whereby the entire control of the franchises and property of the corporation was surrendered to its rival. It was *held* that the minority stockholders in the railroad company could maintain a bill to annul the contract and a receiver was appointed in the action for the purpose of protecting their rights. The Court said (p. 914):

"These proceedings are illegal and violations "of the contract rights of the complainants as "stockholders, and entitle them to proper relief. "In my judgment they are entitled to an account- "ing, as prayed for in their bill and a fair adjust- "ment of the rights of all parties will be facili- "tated by the appointment of a receiver."

Aiken v. *Colo. River Irrigation Co.* (72 Fed. Rep., 591), was a suit of stockholders against the corporation and its directors. It was alleged that the directors were tools of and under the control of one of their number, who profited by certain frauds alleged and who maintained his control by means of spurious stock. It was *held* that the appointment of a receiver to collect and preserve the property of the corporation to meet the charges which the plaintiffs sought to establish was a proper remedy. The Court thus described the action in which the application was made:

"The bill does not ask a dissolution of the cor- "poration, or a statutory receivership to wind up "its business. All that it seeks to accomplish "through the receiver is the collection into his "hands and preservation of the property of the "corporation to meet the equitable charge or lien "which the plaintiffs insist they will ultimately es- "tablish against such property."

In *Pierson* v. *Concord Railroad Company* (62 N. H., 537), it was found that the directors representing a majority of the stock were incompetent to represent that company by reason of their having adverse interests in other contracts. The Court appointed a trustee to represent the Concord Railway Company in all its dealings and litigation with the Upper Roads, saying:

"The law does not suffer a trust to fail for want "of a trustee. * * * In this case the failure "would be partial. The trustees, namely, the di- "rectors of the Concord Railroad, are disabled to

"perform their official duty * * * only as "far as dealings between that and the upper com- "panies are concerned."

Wayne Pike Company v. *Hammons* (129 Ind., 368), was an action by minority stockholders against the corporation and its officers to compel an accounting and to obtain the appointment of a receiver. The complaint charged the officers with mismanagement and favoritism. It was *held* that a receiver should be appointed under the statute which empowered the Court to appoint receivers whenever it might be necessary to secure justice to the parties.

State ex rel. Telegraph Company v. *Second Jud. Dist. Court of Silver Bow County* (15 Mont., 324; 48 Am. St. Reps., 682), was a proceeding by *certiorari* to review the action of the Court in appointing a receiver, the contention being that the Court had no jurisdiction to do so. The action in which the receiver was appointed was between two Montana corporations, which were organized to carry on messenger business in Butte. They united their interests and later the defendants got control, and had since absorbed the profits and made notes secured by the franchises to one Puddington, ostensibly to purchase a franchise, but really to deprive the plaintiffs of all their interests by foreclosure. In this action the Court had ordered the appointment of a receiver *pendente lite*, for the purpose of protecting the interests of the minority stockholders. The Court said:

"We are fully aware of the reluctance of courts "of equity to interfere by receivership in the man- "agement of corporations, or to take the manage- "ment from trustees elected by the shareholders "* * * But the case before us is not an ordi- "nary one. * * * It is difficult to imagine "a case more thoroughly saturated with fraud. "* * * They (the directors) intended to buy "a worthless franchise to wipe the corporation out. "Here interference is essential to the attainment

"of justice and essential to the protection of the "corporate rights. To allow such a proceeding, it "seems to us, would shock the conscience of the "most indifferent court."

In *Haywood* v. *Lincoln Lumber Company* (64 Wis., 639), a receiver of the corporation had been appointed at the instance of a stockholder for the purpose of preserving the corporate property against loss through the collusion and fraud of its officers and directors. A question arose as to the jurisdiction of the Court to appoint him. The Supreme Court *held* that the facts were such as to justify and require the appointmemnt. The Court said:

"* * * Within the general powers of a court "of chancery preserved in the revised statutes, "this was a proper case for an injunction and re- "ceiver both. The property of the company was "being mismanaged and was in danger of being "lost to the stockholders and creditors through the "collusion and fraud of its officers and directors. "The only place of safety for the business and "property of the company was in the 'hand' of the "Court through a receiver *pendente lite*. A "stronger case for a receiver could scarcely be "made."

In *Re Lewis* (52 Kans., 660), was an application for a writ of *habeas corpus* challenging the power of the district court to appoint a receiver in a stockholders' action where mismanagement by the president alone was charged. The Court appointed the receiver and Lewis refused to turn over the property to him, claiming that the Court was without jurisdiction to appoint a receiver in such a case. The Court sustained the appointment. It said:

"The facts alleged if sustained would seem to "justify a court of equity *apart from statutory* "*provision*, in appointing a receiver to protect the "interests of stockholders against the malfeasance

"of the officers in charge of the corporate business "and their fraudulent misapplication of its prop- "erty and funds."

In Fisher v. *Concord Railroad Company* (50 N. H., 200), it appeared that a conductor who was also a stockholder, being prosecuted by the railroad company for embezzlement, organized a movement to buy out the stock of the company and to elect new directors who should withdraw the suit at his wish. A receiver was appointed for the purpose of protecting the interests of the minority stockholders in that prosecution.

Cameron v. *Groveland Improvement Company* (20 Wash., 169; 54 Pac. Rep., 1128), was a suit in equity by minority stockholders for themselves and any others who might join to compel the directors to account and for the appointment of a receiver *pendente lite* on charges of fraud and mismanagement by the stockholders. It was *held* that a receiver was properly appointed for the purpose of protecting the minority interests.

In *Miner* v. *Belle Isle Ice Co.* (93 Mich., 97), the prayer of the bill was for the appointment of a receiver and an accounting by the trustees and officers and for the winding up of the affairs of the corporation. The complaint alleged gross mismanagement on the part of the president. The Court considered that the case was a proper case for the appointment of a receiver and said:

"The simple statement of the facts ought to de- "cide the case (p. 108).

"The general rule undoubtedly is that courts "have no power to wind up a corporation in the "absence of statutory authority. This rule is, "however, subject to qualifications (p. 112). " * * * The present case furnishes an in- "stance of gross breach of trust. The law requires "of the majority the utmost good faith in the "control and management of the corporation as to

"might divide the whole assets of the company "and pass a resolution that everything must be "given to them, and that the minority should have "nothing to do with it. Assuming the case to be "as alleged in the bill, then the majority have put "something into their pockets at the expense of "the minority. If so, it appears to me that the "minority have a right to have their share of the "benefits ascertained for them in the best way "that the court can do it and given to them."

Farmers' Loan & Trust Company v. *New York & Northern R. R. Co.* (150 N. Y., 411), was an action to foreclose a mortgage. This action was instigated by a rival corporation, which had obtained control of the majority of the stock of the mortgagor corporation, and for the purpose of effecting a transfer of the property of the mortgagor to its rival. The Court *held* that this could not be done, saying (p. 431):

"A corporation purchasing the majority of the "stock of another competing one cannot obtain "control of its affairs, divert the income of its "business, refuse business which would enable the "defaulting company to pay its interest, and then "institute an action in equity to enforce its ob- "ligations, for the avowed purpose of obtaining "entire control of its property to the injury of "the minority stockholders. Such a course of "action is clearly opposed to the true interests of "the corporation itself, plainly discloses that one "thus acting was not influenced by any honest de- "sire to secure such interest, but that its action "was to serve an outside purpose, regardless of "consequences to the debtor company, and in min- "ority of the shareholders say in effect that a "manner inconsistent with its interest and the in- "terest of its minority stockholders."

In *Jackson* v. *Ludeling* (21 Wall., U. S., 616), the local managers and officers of a corporation of which the

greater portion of the stock was held by non-residents obtained an order of sale under a mortgage to secure the bonds and proceeded in a hasty and secret way to sell the railroad and buy it at a price much below its value. The conditions of sale were made such as to render it difficult for persons generally to purchase, and the whole proceeding was attended with evidence of gross disregard of the interest of the bondholders, and of course of the stockholders also. It was *held* that the managers and officers of the corporation were trustees alike for the stockholders and its creditors, and that they had no right to enter into or participate in any combination, the object of which was to divest the company of its property, and obtain it by sale at a sacrifice.

In *Ervin* v. *Oregon Railroad & Navigation Co.* (27 Fed. Rep., 630), a number of stockholders combined to constitute themselves a majority to control the corporation, and it was *held* that they became for all practical purposes the corporation itself and assumed the trust relation of the corporation to its stockholders and that they could not make a profit out of it at the expense of those whose rights are the same as their own; that such a profit was a constructive fraud upon the minority stockholders, which a court of equity would remedy.

See also:

Rogers v. *Nash, C. & St. P. R. Co.*, 91 Fed. Rep., 299.

Eldred v. *Am. Palace Car Co.*, 96 Fed. Rep., 59.

De Neufville v. *N. Y. & Northern R. Co.*, 81 Fed. Rep., 10.

Henshaw v. *Salt Riv. Canal Co.* (Ariz.), 54 Pac. Rep., 577.

Sage v. *Culver*, 147 N. Y., 241; affirming 71 Hun, 42.

Barr v. *N. Y., Lake Erie & W. Co.*, 96 N. Y., 444.

Wright v. *Oroville Mining Co.*, 40 Cal., 20.

Smith v. *Dorn*, 96 Cal., 73.

Goodwin v. *Cincinnati, etc., Canal Co.*, 18 Ohio St., 169.
Rogers v. *Lafayette Agricultural Works*, 52 Ind., 297.
Parson v. *Concord R. R. Co.*, 62 N. H., 537.
Higgins v. *Lansing*, 154 Ill., 301.
Forrester v. *Boston & Mont. Consol. Copper Co.* (Mont.), 55 Pac. Rep., 353.
Mason v. *Harris*, 11 Chan. Div., 97.

SECOND POINT.

UNDER THE AUTHORITIES THE AGREEMENT OF DECEMBER 12, 1900, CONSTITUTED A WRONG AGAINST THE MINORITY STOCKHOLDERS AND CREDITORS, AND WAS FRAUDULENT AS TO THEM.

The agreement on its face constitutes one of the most glaring instances of a barefaced defiance by a majority combination of the rights of minority stockholders and actual creditors that can be found in the books. It unites several species of flagrant wrongs upon them. By its terms as approved by the offending directors the offices of the corporation are bartered away for money; its control is given to its enemies; it is stripped of its property and driven out of business. The creditors and minority stockholders are left absolutely without prospect of recovering anything for their claims or of future value for their stock. The corporation is practically dead if that agreement stands.

And first: The bartering of the offices provided for in the agreement of December 12 was illegal.

In *Fennessy* v. *Ross*, N. Y. Supreme Court (90 Hun, 298), the action was for damages for failure to pay for certain shares of stock in three companies. It appeared in addition that the parties had agreed that the defendant should have the management of the three companies

at a certain salary and that after the expiration of one year he should have a larger salary and that he should have equal representation in the boards of directors of the three companies and should be made vice-president and general manager of them, and that in case either party should desire to sell his holdings of stock in the three companies he should give the other party the first opportunity to purchase at a price named. It was *held* that the contract was an attempt to barter away the offices and management of the corporations and was void as against public policy.

In *Guernsey* v. *Cook* (120 Mass., 342), it was *held* that a contract by which a shareholder in a corporation, in consideration of the purchase of a part of his stock, at a price named, agreed to secure to the purchaser the office of treasurer in the corporation at a fixed salary and in case of his removal to repurchase the stock, was void as against public policy and was a fraud on the other members of the corporation.

In *Wilbur* v. *Stopel* (82 Mich., 344), it was *held* that the plaintiff could not enforce a contract in which it had been agreed that if the plaintiff would purchase certain shares of the defendant, a part of the stockholders would make him general manager, and in case he should be ousted from that office would buy his stock. The defendants were directors of the corporation. The Court declared such contracts to be against public policy, as necessarily placing the directors in a position where their interests conflicted with the interests of the corporation.

In *Sugden* v. *Crossland* (3 Sm. & Gif., 192), Horsefield was a trustee under a will. Crossland paid him £75 to withdraw from the trust and have Crossland appointed in his place. It was held that the £75 belonged to the estate, and judgment was given against Crossland.

In *McClure* v. *Law* (161 N. Y., 78), money was received from an outsider by a director and a president

of a life insurance company for procuring the outsider and his friends to be elected directors and given the control and management together with the property and effects of the corporation. It was held that the money so received was money obtained by virtue of his office, for which he must account to the corporation.

To the same effect *Gaskell* v. *Chanters,* 28 Beaver, 360.

In *Cook on Corporations* (Sec. 650) it is said:

"It is a well-established principle of law that "a director commits a breach of trust in accepting "a secret gift or secret pay from a person who is "contracting or has contracted with the corpora- "tion, and that the corporation may compel the "director to turn over to it all the money or prop- "erty so received by him."

In *Perry on Trusts* (Sec. 427), it is said:

"Trustees hold a position of trusts and confi- "dence. The legal title of the trust property is "in them; and generally its whole management "and control is in their hands. * * * They "cannot use the trust property nor their relation "to it for their own personal advantage. All the "power and influence which the possession of the "trust fund gives must be used for the advantage "and profit of the beneficial owners and not for "the personal gain and emolument of the trus- "tee."

And second: The contract of December 12 is illegal because it dissipates the assets of the corporation. These assets consisted of valuable mining property in Sonora; of copper matte in New York and elsewhere and of *choses in action* concerning these properties. All these are in effect given away or abandoned. The suits to recover these properties were to be dismissed. In these suits

more than $20,000 had been expended and $50,000 additional liability has been, it is claimed, incurred. Therefore, the dismissals alone represented $70,000 which would have to be expended in case the suits were recommenced. But in effect the suits and claims were intended to be abandoned since the control was given to the adversary. Therefore, mining property of upwards of $1,000,000 in value, perhaps $50,000,000, was given away. The agreement further provides that the copper matte in New York was to be turned over to Greene and his associates.

No consideration was payable to the corporation for this immense concession and transfer to its adversary.

All this was illegal. Any text book on the subject is sufficient authority for this plain proposition.

In *Thompson's Commentaries*, Sec. 4014, the law is thus stated:

> "It is the duty of the directors and other officers "of a corporation to preserve its property as a "trust fund of what they are the guardians, and "to administer it for the purposes of the trust. "They have no right to divide the corporate prop- "erty among themselves or give it away without "consideration."

The claim that the Cobre Grande Company was in financial difficulties at this time does not change the legal situation.

Directors cannot wreck even a bankrupt corporation in this way. The assets and property of insolvent corporations constitute a trust, which the directors as trustees must honestly administer for the benefit of all concerned.

> "When a corporation becomes insolvent, it is so "far civilly dead, that its property may be ad- "ministered as a trust fund for the benefit of its "stockholders and creditors. A court of equity "at the instance of the proper parties will then

> " and highly reprehensible, and the learned Dis-
> "trict Judge, who was then holding the Circuit
> "Court, undoubtedly suffered the judgment *pro*
> "*forma* to be entered under the impression that
> "there was in fact a controversy between the plain-
> "tiff and defendant and that they were proceed-
> "ing to obtain a decision upon a disputed ques-
> "tion of law, in which they had adverse interests.
> "A judgment in form, thus procured, in the eye of
> "the law is no judgment of the court. It is a
> "nullity, and no writ of error will lie upon it."

The order of the Supreme Court dismissing the writ of error contained the following:

> "It appearing to the Court here, from the af-
> "fidavit and other evidence filed in the case by
> "Mr. Moor, in behalf of third persons not parties
> "to this suit, that there is no real dispute between
> "the plaintiff and defendant in this suit, but
> "on the contrary, that their interest is one and the
> "same, and is adverse to the interest of the per-
> "sons aforesaid, it is the opinion of this court,
> "that the judgment of the Circuit Court entered
> "*pro forma* in this case is a nullity and void, and
> "that no writ of error will lie upon it. On con-
> "sideration whereof, it is now here ordered and
> "adjudged by this court, that the writ of error
> "be, and the same is, hereby dismissed," etc.

In *Chamberlain* v. *Cleveland* (1 Black, U. S., 419; Lawyers' Ed., Vol. 17, p. 93), Cleveland as a judgment creditor of a railroad company in a suit in equity had procured a decree setting aside a fraudulent conveyance made to Chamberlain. Subsequently, by the intervention of a friend, Chamberlain purchased Cleveland's judgment and then took an appeal from the decree setting aside the transfer to him for the purpose of injuring other judgment creditors of the debtor.

Certain persons not parties to the record asked to intervene and moved the Court to dismiss the appeal on the

ground that it was not conducted by parties having adverse interests, but for the purpose of obtaining a decision of the Court to affect the interests of persons not parties. Mr. Justice Grier, in delivering the opinion of the Court dismissing the appeal, said:

> "There is no material difference between this "case and that of Lord *v.* Veazie, 8 How., 254, "when the whole proceeding was justly rebuked "by the Court as 'in contempt of the court and "highly reprehensible.' * * * It is plain that "this is no adversary proceeding, no controversy "between the appellant and the nominal ap- "pellee. * * * We repeat, therefore, what "was said by the Court in that case: 'Any at- "tempt by a mere colorable dispute, to obtain the "opinion of the Court upon a question of law, "which a party desires to know for his own in- "terest or his own purposes, when there is no "real and substantial controversy between those "who appear as adverse parties to the suit, is an "abuse which courts of justice have always repre- "hended, and treated as a punishable contempt of "court."

In *East Tennessee R. R. Co.* v. *Southern Telegraph Co.* (125 U. S., 695; Lawyers' Ed., Vol. 31, p. 853), a writ of error had been taken to the United States Supreme Court and it was suggested to the Court after the record was filed that there was no real controversy, as the Western Union Telegraph Company had acquired the interest of both parties to the suit, and the Court thereupon made an order that the plaintiff in error show cause why the writ should not be dismissed, and two attempts were made by the plaintiff in error to do so, but the showing having failed to satisfy the Court that a real controversy existed, the writ was dismissed. In delivering the opinion of the Court dismissing the writ, Mr. Justice Miller said:

> "It was suggested by a letter from counsel em- "ployed on one side of this suit that his party had

"sold out the interests which it had to the other "party, who was prosecuting it now and was *dom-* "*inus litis* on both sides. A ruling was made some "time ago before the death of the late Chief "Justice, in effect that there was sufficient evidence "to that effect to require the case to be dismissed, "unless the side now prosecuting it for decision "would show satisfactory evidence that it was a "*bona fide* suit. Two attempts have been made "and we are agreed in the opinion that they are "both failures, and that the original order should "now be carried out, dismissing the case on the "grounds set forth in the opinion of the Chief "Justice delivered at the time."

In *The South Spring Hill Gold Mining Co.* v. *The Amador Medean Gold Mining Company* (145 U. S., 300; Lawyers' Ed., Vol. 36, p. 712), a writ of error had been taken from a judgment of the Circuit Court of the Northern District of California, and upon the case coming on for argument in the Supreme Court, Hon. Goerge S. Boutwell, who was counsel for the plaintiff in error, called the attention of the Court to the fact that since the decision of the Circuit Court the control of both the corporations, parties to the suit, had come into the hands of the same persons, but that there was a minority of stockholders in the Amador Medean Gold Mining Company who retained the interest that they had at the time the decision was rendered; that the two corporations were still in existence and organized and that the present managers and owners of the property were anxious that the question should be decided in order that the minority of the stockholders might receive whatever, by the finding of the Court, would be due them. The Court, by Chief Justice Fuller, said:

"We cannot, however, consent to determine a "controversy in which the plaintiff in error has "become the *dominus litis* on both sides. We as- "sume that this is not an agreed case gotten up by "collusion; but the litigation has ceased to be be-

"tween adverse parties, and the case therefore "falls within the rule applied where the contro- "versy is not a real one."

Citing:

American Wood Paper Co. v. *Heft*, 75 U. S., 8 Wall., 333.
Cleveland v. *Chamberlain*, 66 U. S., 1 Black, 419.
Lord v. *Veazie*, 49 U. S., 8 How., 251.
Washington Market Co. v. *District of Columbia*, 137 U. S., 62.

In *Black on Judgments* (Sec. 508), it is said:

"But to create an estoppel it is essentially neces- "sary that there be a genuine and honest judg- "ment. It must not be merely collusive or simu- "lated. A judgment or sentence we are told is a "judicial determination of a cause agitated be- "tween real parties, upon which a real interest has "been settled. In order to make a sentence there "must be a *real interest, a real argument, a real "prosecution, a real defense, a real decision.*"

In the celebrated *Gaines* case the U. S. Supreme Court held that a prior judgment in *Patterson* v. *Gaines* could not be invoked as binding on the parties because the action was amicable and the judgment collusive and therefore although it had been affirmed in the U. S. Supreme Court it was disregarded there when offered as evidence of an adjudication. *Judge Taney* summarized his conclusions in these words:

"That the decree of this Court in Charles Pat- "terson's case does not affect the defendants for "two reasons: 1st, because they were no parties "to it; and 2nd, *because it was no earnest contro- "versy.*"

Gaines v. *Relf*, 12 How. (U. S.), 472, 539.

In *Humes* v. *Scruggs* (94 U. S., 22, 24), it was held that an assignee in bankruptcy was not bound by a decree rendered in a suit against the bankrupt where there were indications of collusion. The Court said:

> "There would be little difficulty in making and "sustaining fraudulent transfers of property if "the parties could by a subsequent suit between "themselves so fortify the deed that no others "could attack it."

In *Johnson* v. *Waters* (111 U. S., 640), it was held that a creditor might maintain an action to set aside a fraudulent sale of his debtor's property although he was an innocent party to the proceedings. *Judge Bradley* said (p. 667):

> "The Court of Chancery is always open to hear "complaints against it, whether committed *in pais* "or in or by means of judicial proceedings. In "such cases the Court does not act as a court of "review, nor does it inquire into irregularities or "errors of proceeding in another court; but it will "scrutinize the conduct of the parties and if it "finds that they have been guilty of fraud in ob"taining a judgment or decree, it will deprive them "of the benefit of it and of any inequitable ad"vantage which they have derived from it."

In *Bissit* v. *Kentucky River Co.* (15 Fed. R., 353) it was held that a judgment obtained by a creditor against a corporation was not binding upon the stockholders where it had been carelessly defended and was evidently collusive.

To the same effect was *Wilson* v. *Keissel* (Supreme Court of Utah, 1894), 35 Pac. Rep., 488.

Other cases holding that there can be no valid judgment where there is no real and earnest controversy between the parties to the action are the following:

Fletcher v. *Peck*, 6 Cranch, 87.

State of California v. *S. P. & T. R. R. Co.*, 14 U. S., 308.

Little v. *Bowers,* 134 U, S., 547.
Singer Mfg. Co. v. *Wright,* 141 U. S., 696.
County of Dakota v. *Glidden,* 113 U. S., 222.
County of San Mateo v. *S. P. R. R. Co.,* 116 U. S., 138.

The circumstances under which the judgment of dismissal was signed by Judge Street also show conclusively that his decision was merely the registering of an agreement entered into by the parties; that the judgment was prepared by agreement between the two sets of attorneys, both of whom were controlled by Greene, and submitted to Judge Street for signature in pursuance of the agreement already made that the suit should be dismissed. It appears by the testimony of Mr. Jamison that the case was re-submitted to Judge Street on Saturday, April 13th, 1901 (p. 89). The judgment was filed on April 15th, 1901, at 11 A. M. (p. 118). It does not appear when, if ever at all, Judge Street announced any decision. All that appears is that there was an agreement to re-submit the case and that Judge Barnes, Mr. Greene's attorney, then prepared a judgment dismissing the complaint upon the merits and forwarded it to Mr. Chalmers, supposed to represent the Cobre Grande Co., who marked it "O. K.," and presented it to Judge Street, who signed it in time to have it entered on April 15th, 1901, at 11 A. M.

Mr. Chalmers appears in this action as attorney for the defendants asking a dismissal of the complaint (p. 72) and was a witness on the trial for defendants (p. 84) and assisting in the defense as counsel (p. 57) and was elected a director in the Greene interest on April 3, 1901, when the old board resigned (p. 58).

All the circumstances not only justify but require the Court to hold that this judgment was merely the agreement of the parties, and a judgment entered by consent to avoid the effect of the injunction restraining the dismissal of the action. Whether or not Judge Street was a party to this collusive judgment is entirely immaterial. The material fact is that there was no longer any real controversy between the parties; that the attorneys on

both sides were controlled by Greene and were simply engaged in carrying into effect an agreement for the dismissal of the suit which had already been made. If Judge Street was ignorant of the fact that the case had been settled between the parties, the attorneys who deceived him might be guilty of a contempt of Court. If he signed a judgment purporting to be upon the merits and to decide any real issues in the case when he was simply recording the agreement of the parties, he was either guilty of an inadvertence or of improper judicial conduct, but in neither event could he give any judicial weight or credit to the judgment.

FIFTH POINT.

THE FACT THAT PENDING THIS ACTION THE SITUATION HAS CHANGED SO THAT THE PLAINTIFF CAN NOT NOW BE GIVEN THE RELIEF TO WHICH HE WAS ENTITLED WHEN THIS ACTION WAS COMMENCED DOES NOT DEPRIVE THE PLAINTIFF OF THE RIGHT TO AN APPROPRIATE REMEDY UPON THE EXISTING FACTS.

The complaint filed demanded judgment restraining the Cobre Grande Copper Company and its officers from discontinuing or causing to be discontinued or dismissed the suits then pending; for a mandatory injunction to issue directing the Cobre Grande Copper Company to faithfully prosecute and pursue on its behalf all actions and proceedings for the recovery of its property; that the plaintiff be brought in and made a party plaintiff to said action and proceedings; that the defendants Greene and Mitchell be restrained from demanding or receiving from the Phœnix National Bank the papers and documents evidencing title to the properties and that the Phœnix National Bank be restrained from delivering said papers and that the plaintiff might have such other and further relief as may be just.

In discussing the complaint the District Court held that inasmuch as notwithstanding the preliminary injunction

obtained by plaintiff the defendants had succeeded in accomplishing the greater part of their fraudulent design; the actions against them had been dismissed and the title deeds delivered to Greene the plaintiffs could obtain no relief but the possible appointment of a receiver and even that was useless.

The decision of the Court upon this point necessarily proceeds upon the theory that if the legal situation at the time of its decree is not such as to bring the facts precisely within the complaint no remedy can be obtained. This is error. The defendants are within the jurisdiction of the Court and may be compelled to do justice to the plaintiffs. If they have since the commencement of this action improved their situation without right, to the prejudice of the plaintiffs, their situation can be restored as it existed at the commencement of the action, and the plaintiffs awarded such redress as is proper under the circumstances.

A court of equity, having obtained jurisdiction, may and generally does adapt the relief to the situation existing at the close of the litigation.

> *Dannert* v. *Osborn*, 140 N. Y., 30, 43.
> *Madison Ave. Baptist Church* v. *Oliver St. Baptist Church*, 73 N. Y., 82.
> *Worrall* v. *Munn*, 38 N. Y., 137.
> *Gay* v. *Gay*, 10 Paige, 369.
> *Sherman* v. *Foster*, 158 N. Y., 587.
> *Peck* v. *Goodberlett*, 109 N. Y., 189.

> "The right to judgment is not limited to the "facts as they exist at the commencement of the "action, but the relief administered is such as the "nature of the case and the facts as they exist at "the close of the action demand."
>
> MAYNARD, *J.*, in Pond *v.* Harwood, 139 N. Y., 111, 120.

In *Van Allen* v. *N. Y. El. R. R.* (144 N. Y., 174), plaintiff sought an injunction against a continuing trespass upon his property. At the time when he began the

"the minority (p. 116). * * * This corpora-
"tion has utterly failed of its purpose, not because
"of matters beyond its control, but because of
"fraudulent mismanagement and misappropria-
"tion of its funds. * * * A court of equity
"will not so far tolerate such a manifold violation
"of the rules of natural justice as to deny him the
"relief to which his situation entitles him."

In the exercise of its general jurisdiction the court in that case order the appointment of a receiver.

In all these cases the appointment was made upon the general principle that a court of equity has inherent power to appoint a receiver of a corporation to protect its stockholders whether a minority or otherwise, with or without statutory authority.

The cases cited below to show that a court of equity cannot appoint a receiver of a corporation without statutory authority therefor, when critically examined will be found to deal simply with the power to dissolve a corporation. Such were

Murray v. *Superior Court*, 129 Cal., 632.
Neal v. *Hill*, 16 Cal., 150.
French Bank Case, 53 Cal., 495.
Decker v. *Gardner*, 124 N. Y., 334.
Atty. Gen'l v. *Utica Ins. Co.*, 2 Johns. Ch., 375.

In none of these cases was there any allegation of fraud or breach of trust.

FOURTH POINT.

THE JUDGMENT ENTERED IN THE SUIT IN THE DISTRICT COURT IN MARICOPA COUNTY WAS COLLUSIVE AND VOID AND THE COURT BELOW ERRED IN GIVING ANY FORCE OR EFFECT TO IT.

In his decision Judge SLOAN says:

> "It was also shown that the action pending in "the District Court of Maricopa County was de- "cided and had gone to judgment. * * * (*Rec- "ord*, p. 50).
>
> "A receiver is asked for upon the grounds that "the action pending in this territory, at the time "of the institution of this suit, and which has since "been decided by the District Court of Maricopa "County, was one brought in good faith by the "Cobre Grande Copper Company to recover the "possession of the Mexican property, and that the "cause of action in said suit grew out of the al- "leged wrongful ouster from the possession of "said mining property by the defendants Greene, "Mitchell, and the Greene Consolidated Copper "Company that the agreement between Gage, as "president of the Cobre Grande Copper Company, "and as trustee for the holders of said 115,049 "shares of the stock of said Company, and the "Greene Consolidated Copper Company, in which "it was attempted to bind the Cobre Grande Cop- "per Company from further proceeding with the "said litigation and in which it was provided that "said suit should be discontinued and dismissed, "is fraudulent; first, because it provided for no "adequate consideration to be paid the Cobre "Grande Copper Company for its agreement to "abandon said litigation; and, second, that it pro-

"vided for large individual gains to be paid Gage "and the other directors of the Cobre Grande Cop- "per Company as a consideration for said agree- "ment.

"It is further contended as an additional reason "for the appointment of a receiver that the judg- "ment of the District Court of Maricopa County "is not an estoppel of record for the reason that "at the time of its rendition the Cobre Grande Cop- "per Company was under the control of said "Greene, its officers and directors having been "elected and appointed by him and in his inter- "ests, the directors and officers of the Cobre "Grande Copper Company at the date of the ex- "ecution of the Gage agreement, and in accord- "ance with the terms of said agreement having "resigned and their places having been filled as "aforesaid in the interests of said Greene and "against the interests of the minority stockholders "of said Company.

"The facts show that the suit brought by the "Cobre Grande Copper Company in the Maricopa "County District Court was brought to trial in "October, 1900; that the cause was vigorously "fought on the part of both plaintiff and defend- "ants in that cause; that after hearing the testi- "mony and the argument of the counsel the Court "took the case under advisement; that, pending the "decision, the agreement between Gage and the de- "fendant Greene, above referred to, was entered "into (*Record*, p. 51).

* * * * * * * * * * * * *

"The agreement further provided that the Cobre "Grande Copper Company should dismiss all suits "brought by it against Greene, Mitchell and the "Greene Consolidated Copper Company then pend- "ing in New York, Texas and Arizona; that in the "suit in Texas, the appeal taken by the Cobre "Grande Copper Company to the Supreme Court

"of that State should be dismissed, and the same "suit in the District Court should also be dis- "missed. It was also provided that in the suits "pending in the District Court of Maricopa "County, which had been submitted for decision, "that the order of submission should by consent, "be set aside, and that upon the final payments "being made, said suits should be dismissed (*Rec- "ord*, pp. 51, 52).

* * * * * * * * * * * * *

"The agreement further provided that, upon the "carrying out of its provisions with reference to "the purchase by the parties of the first part of "the Cobre Grande stock, the then directors of the "Cobre Grande Copper Company should resign "as directors and officers of said Company (*Rec- "ord*, p. 52).

* * * * * * * * * * * * *

"It further appears that, after the execution of "said agreement, counsel representing both sides "to the litigation pending in Maricopa County ap- "peared in court in accordance with the terms of "the agreement and procured an order setting "aside the submission theretofore made with the "right to have the case resubmitted therafter and "the decision had upon record already made.

"It further appears that, after the institution "of this suit, the same counsel notified the Judge "of said Court that the case was again submitted "and asked for a decision thereof; that thereafter "said District Court rendered its decision giving "judgment for the defendants in said action.

"It also appears that at the time of the said "re-submission of said cause under the terms of "said agreement the directors of the Cobre Grande "Copper Company, in office at the time of the exe- "cution thereof, had resigned and had been suc- "ceeded by directors elected by Greene and his "associates" (*Record*, p. 53).

We have quoted at length from the opinion of the Trial Judge because it embodies certain facts about which there is no dispute. These are as follows, viz.:

(1) Prior to the commencement of this suit an agreement had been made for the transfer of the control of the corporation to persons who had seized its assets, and who were then engaged in litigation as to the right to retain these assets.

(2) When the present action was begun, this litigation was still pending undetermined.

(3) After the commencement of this action and after the transfer of the control of the Cobre Grande Copper Company to its adversaries, the suit was re-submitted and a decision was rendered in favor of its adversaries.

The findings also show that the suit was decided April 15, 1900, four months after the agreement complained of had given Greene control of the litigation (p. 147), and the Record shows that it was two days after the present suit was started and the injunction had been served (p. 90).

The re-submission, as appears from the decision of Mr. Justice Sloan, was made when there was really only one party to the controversy, to wit, Greene and the Greene Consolidated Copper Company. The adjudication was obtained at the instance, not of those who truly represented the Cobre Grande Copper Company, or its minority stockholders, but at the instance of those who were opposed to it in the litigation. The re-submission was made by attorneys who had accepted compensation from the adversaries of the Cobre Grande Copper Company under this illegal contract and was made on behalf of those adversaries.

Every feature of the re-submission shows that at the time of the re-submission there was no true controversy between the parties to the submission. It was practically a request by both sides for a judgment in favor of the defendants. Under such circumstances the rule

is clearly laid down that a judgment rendered is a nullity and absolutely void.

In *Lord* v. *Veazie* (8 How., U. S., 251; Lawyers' Ed., Vol. 12, p. 1067), it appeared that one Moor, claimed the exclusive right of navigating the Penobscot River in Maine, under an act of the Maine Legislature, and that a railroad and canal company in which Veazie was a large stockholder also claimed the right of navigation. Veazie assigned some of his shares of stock to Lord with a covenant that the corporation had such right of navigation and then Lord brought a suit in the United States Circuit Court of Maine against him for a breach of this covenant. Upon an agreed state of facts a judgment *pro forma* in favor of Veazie was entered and Lord then took a writ of error to the United States Supreme Court. In the United States Supreme Court Moor made a motion to dismiss the appeal on the ground that it was a fictitious case got up between the parties for the purpose of settling legal questions in which he, the said Moor, was interested. The motion was granted and in the opinion of the Court delivered by *Chief Justice Taney*, it was said:

> "The Court is satisfied, upon examining the "record in this case, and the affidavits filed in the "motion to dismiss, that the contract set out in "the pleadings was made for the purpose of in- "stituting this suit, and that there is no real dis- "pute between the plaintiff and defendant. On "the contrary, it is evident that their interest in "the question brought here for decision is one and "the same, and not adverse; and that in these pro- "ceedings the plaintiff and defendant are attempt- "ing to procure the opinion of this court upon a "question of law, in the decision of which they "have a common interest opposed to that of other "persons, who are not parties to this suit. * * * "A judgment entered under such circumstances, "and for such purposes, is a mere form. The "whole proceeding was in contempt of the court,

action he held title to the premises. He conveyed the property prior to the trial. The Court held that the conveyance defeated the plaintiff's right to relief by an injunction, but did not deprive it of jurisdiction of the equitable action, saying:

> "When the jurisdiction has once attached, it is "not affected by changes which occur subsequent- "ly, so long as any cause of action survives, upon "the facts alleged, though such changes may affect "the nature and extent of the relief to which the "party may be entitled" (p. 179).

In *Kilbourne* v. *Supervisors, etc.* (137 N. Y., 170, 178), EARL, *J.*, said:

> "While in actions at law the whole cause of "action must have arisen before the commence- "ment of the action, and no relief can be given as "to anything which occurred subsequently, such is "not the rule in equitable actions. In such an ac- "tion the Court having obtained jurisdiction of "the parties and subject of the action *will bring its* "*relief down to the trial* and thus make an end of "the litigation, so far as it pertains to the matters "in controversy between the parties."

In the case of actions for specific performance of contracts for the sale of land, if it appears upon the trial that the defendant has for some reason always been unable to perform, but that fact is not known to the plaintiff at the time of the commencement of the action, the Court will grant a decree for simple damages because the plaintiff came into equity in good faith.

Holland v. *Worley*, 26 Chanc. Div., 578.
Cotton v. *Wyld*, 32 Bevan.
Betts v. *Nielson*, Law Rep., 3 Chanc. Appeals, 429.
Pratt v. *Law*, 9 Cranch, 456, 494.
Mobile v. *Kimball*, 102 U. S., 691.

Milkman v. *Ordway*, 106 Mass., 232.
Taintor v. *Cole*, 120 Mass., 162.
Wonson v. *Fenno*, 129 Mass., 403.
Ostrander v. *Webber*, 114 N. Y., 95.
Beck v. *Allison*, 56 N. Y., 366.
N. Y. Ice Co. v. *Northwestern Ins. Co.*, 23 N. Y., 357.
Pomeroy Eq. Jur. (2nd Ed.) §§181, 237, 238, 1410.

Jurisdiction of an action to restrain the infringement of letters patent depends upon the existence of valid letters patent at the time of the commencement of the suit, but the fact that the letters have expired before time of trial and hearing will not defeat the right to relief, and the Court will decree an accounting notwithstanding the expiration of the patent.

Adams v. *Howard*, 19 Fed. Rep., 317.
Gottfried v. *Moerlein*, 14 Fed. Rep., 170.

Even if the relief to be awarded under the changed circumstances were novel and without precedent, it would still be within the power of the Court to award the relief in its decree. Powers of courts of equity are not limited and defined. They are sufficiently large to enable them to afford the relief which equity demands under any circumstances which may develop.

Equity has power to contrive new remedies to meet the varying circumstances.

Nashville C. & St. Louis R. Co. v. *McConnell*, 82 Fed. Rep., 65, 76.

In *Toledo A. A. & N. M. Ry. Co.* v. *Penn. Co.* (54 Fed. Rep., 746, 751), the Court said:

> "It is said the orders issued in this case are "without precedent. Every just order or rule "known to equity courts was born of some emer-

"gency, to meet some new conditions, and was "therefore, in its time, without a precedent. If "based on sound principles and beneficient results "follow their enforcement, affording necessary re- "lief to the one party without imposing illegal "burdens on the other, new remedies and unpre- "cedented orders are not unwelcome aids to the "Chancellor to meet the constantly varying de- "mands for equitable relief."

In *Joy* v. *St. Louis* (138 U. S., 50), BLATCHFORD, *J.*, said:

"It is one of the most useful functions of a court "of equity that its methods of procedure are cap- "able of being made such as to accommodate them- "selves to the development of the interest of the "public in the progress of trade and traffic by new "methods of intercourse and transportation."

In *Union Pac. R. Co.* v. *Chicago, R. I. & P. R. Co.* (163 U. S., 564, 601), FULLER, *C. J.*, said:

"It must not be forgotten that in the increasing "complexities of modern business relations equi- "table remedies have necessarily and steadily been "expanded and no inflexible rule has been per- "mitted to circumscribe them. As has been well "said equity has contrived its remedies, 'so that " 'they shall correspond both to the primary right " 'of the injured party, and to the wrong by which " 'that right has been violated;' and 'has always " 'preserved the elements of flexibility, and expan- " 'siveness, so that new ones may be invented, or " 'old ones modified, in order to meet the require- " 'ments of every case, and to satisfy the needs of " 'a progressive social condition in which new " 'primary rights and duties are constantly aris- " 'ing and new kinds of wrongs are constantly " 'committed.' Pom. Eq. Jur., §111."

When the action was commenced, the deeds were still in the Phœnix Bank and no judgment had been rendered in the Maricopa County suit, and the Court had power to restrain the delivery of those deeds and prevent any further action being taken in the suit until the minority stockholders could be properly represented in it. At the time of the trial the deeds had been delivered in pursuance of a judgment collusively entered in the Maricopa County suit, and the plaintiffs should have been awarded relief framed to the changed circumstances, *i. e.*, the collusive judgment should have been vacated and set aside; the deeds ordered to be returned to the Phœnix Bank; and a receiver appointed, who could become a party to and control the Maricopa County suit, and have that controversy litigated upon its merits, and, if necessary, carried by appeal to the Supreme Court of the United States, where a cause of that magnitude would ordinarily go for final decision.

SIXTH POINT.

THE APPOINTMENT OF A RECEIVER WAS NOT ONLY NECESSARY AND REQUIRED BY THE PROOFS, BUT WAS ESSENTIAL TO FULL AND ADEQUATE RELIEF TO THE PLAINTIFFS.

The Court below in its decision says that full relief can be granted to the plaintiffs in independent actions brought by them to redress the wrongs done to the corporation and therefore the appointment of a receiver of the corporation is not necessary to do them justice.

If this be so, it would be no answer to the prayer for a receivership. Where there are two remedies at law it has never been pretended that one legal action can be dismissed because another legal action would give the plaintiff a remedy.

The same is true of equitable actions, and where there are two different ways of proceeding to secure a relief to which plaintiff is entitled he may pursue the remedy he

desires, and if he applies to the Court for a proper remedy, he cannot be turned away on the ground that there is open to him some other remedy which would procure for him the same result.

It is submitted, however, that there are several particulars in which the appointment of a receiver would give relief to which they are entitled, which cannot be obtained in any other way.

First.—If a receiver of the corporation were appointed he would be entitled to all the books, papers and documents of the Company and would be therefore better able to protect the corporate rights than a mere stockholder would when the hostile directors were in possession of the corporate papers and records.

Second.—There are certain actions and proceedings which could be brought by a receiver, but which could not be brought at all by the stockholders, at least as far as anyone is able to see. For instance, a receiver of the corporation could proceed to Mexico and take up again the proceedings commenced there by the Cobre Grande Copper Company to have restitution of the mines awarded to it, and could litigate before the courts of Mexico the right of possession of the Cobre Grande Copper Company. Whether or not a stockholder of the Company could go down to Mexico and do the same thing does not appear; a stockholder is entitled to be put in a position where litigation in support of the rights of the corporation can be carried on in the most effective way and with the least danger of defeat.

Third.—The minority stockholders are entitled to have the rights of the corporation protected and defended at the cost of the corporation, and not at their own cost. At present, all efforts to protect the rights of the Cobre Grande Company are being carried on by the minority stockholders at their own cost, and the expense of defeating these efforts is borne presumably, in part at least, by the treasury of the Cobre Grande Copper Company, which is controlled by Greene.

The suggestions in the opinion below that the receiver if appointed would be confronted with difficulties arising from lack of funds, &c., are, we submit, not sufficient to justify a dismissal of this complaint. The parties in interest may provide him with the necessary funds.

SEVENTH POINT.

CERTAIN OTHER ASSIGNED ERRORS APPEARING IN THE RECORD.

A. The first and second assignments of error relate to the exceptions taken to the admission in evidence of the collusive judgments, dismissing certain proceedings of the Cobre Grande Copper Company obtained in Arizona and Texas in April and May, 1901.

Objections to the Arizona Record.—The offer in the Arizona record is found on p. 74, and the ruling and exception taken by plaintiff to its admission is on p. 75.

This Arizona record has been heretofore discussed in this brief.

Objection to the Texas Record.—The Texas record is on pp. 121-136, and the exception to its admission is on p. 75 of this record. It sets forth an action in replevin to recover matte from third parties, who claim to be innocent holders thereof, judgment for the defendants, and an appeal which was dismissed May 15, 1901, *by consent*, after Greene had got control of the Cobre Grande Copper Company (*see Record*, p. 135). There is no finding as to this Texas record, so that it probably need not be further discussed than to say that being an action in replevin, to which the plaintiff was not a party, it could not in any view be considered an adjudication of his rights as a stockholder nor of the title of the Cobre Grande Copper Company to these mines.

It was part of the fraudulent agreement of December

12th that these two causes should be dismissed (*Record*, p. 106).

B. *The Fifth Assignment of Error.*—The witness Gage, former president of the Cobre Grande Copper Company, a party to the agreement of December 12, 1900, complained of, was asked by defendants this question:

> "Q. Referring to the agreement of December
> "12, 1900, will you state what the $25,000 and the
> "two amounts of $30,000 therein mentioned, mak-
> "ing $85,000, was for?"

This was objected to by plaintiffs' counsel and objection overuled, and plaintiffs excepted (*bottom* of p. 78 and *top* of p. 79). This ruling constitutes the fifth assignment of error (p. 206).

Upon this evidence Judge Sloan found in accordance with Gage's statement as to the *intention* of these payments (*see Finding IX*, p. 151). We submit that this was error.

C. *The Secret Trust to Gage.*—Whatever the intention might have been Gage received $85,000 in these three sums, without any contract or binding agreement on his part as to the disposition thereof. Defendants claim that there was a secret trust for the benefit of Hallenborg as creditor hidden in these payments. This agreement was the work of able counsel, among the most astute in the Territory of Arizona. What could have been the object of this $85,000 secret trust in Gage's hands? The Court finds (p. 151) that it was intended to pay the company's debts, including Hallenborg. It appears upon the trial of this case that Hallenborg has not been paid, and he has in fact never been paid to this day. Mr. Gage testified:

> "I did not make any effort to apply the $60,000
> "to the payment of the New York notes." (P. 81.)

If there was a secret trust, and it was intended to use

it as a club to compel Hallenborg to surrender his position, by refusing to pay his notes unless he did so, these parties should not be allowed to come in afterwards and escape the consequences of this illegal agreement by declaring innocent intentions. The legal or illegal effect was the same, whatever the intentions were.

The statement of a mere intention is not competent as evidence to justify an illegal transaction. It is to be noted that in addition to these sums Gage received 5,000 shares of stock equivalent to $50,000 "for his own use "and benefit," and the former counsel for the Company received 5,000 shares equivalent to $50,000 more, apparently to induce the assent of the President of the Company and the counsel who had represented it, to this fraudulent transaction (*see Record, copy of agreement, p. 106*).

Gage tried unsuccessfully on the trial to explain this $50,000 transaction in the following language:

> "I do not know of the application of any particu-
> "lar sum towards my salary out of this money
> "obtained under the agreement of December 12th.
> "I retained what I had. The contract was 5,000
> "shares of stock. They afterwards paid me
> "$50,000 in lieu of that. I do not know how much
> "of it was for salary. Might call it all salary or
> "expenses or anything else—salary and expenses.
> "I do not recollect how it was divided. There was
> "a salary of $15,000 a year voted me at one of the
> "meetings. I think that was November, 1900.
> "That was the first vote for salary attached to the
> "President's office." (*Record, bottom of p. 83.*)

There was therefore only a month's salary of $1,250 due Mr. Gage at the time when he got $50,000 for signing this fraudulent contract.

Of course the directors could not legally vote Gage any sum whatever for back salary.

> *Bennett* v. *St. Louis, etc., Co.*, 19 Mo. App., 349.

It is true that the Court finds this contract was entered into in good faith, with the knowledge and consent of the directors and upon the advice of counsel, that is to say, of the very counsel who got 5,000 shares of stock in the Greene Company; but no amount of good faith can justify such an immoral and reckless transaction as was consummated under this agreement.

EIGHTH POINT.

THE SUPREME COURT OF ARIZONA ERRED IN REFUSING TO CERTIFY A STATEMENT OF THE FACTS IN THE NATURE OF A SPECIAL VERDICT.

The Trial Court having failed to make full and complete findings, it became the duty of the Supreme Court of Arizona to examine into the record of this case and make and certify a statement of fact in the nature of a special verdict, which should include all material facts proven by uncontroverted testimony and especially those omitted or incorrectly stated by the lower court.

> *Organic Law of Arizona*, 1 Supp., R. S. U. S., p. 7; being Chap. 80; 43rd Cong., April 1, 1874.

A petition for such a statement of facts in the nature of a special verdict was presented by the plaintiffs' counsel to the Supreme Court of Arizona and is found in the record pp. 182-192. The request was refused by the learned Chief-Justice Kent (*see memo. p. 192*).

We have made this the ground of the 21st assignment of error (p. 211).

In this case a great many uncontroverted facts were omitted in the findings signed by the trial justice, notably those tending to establish collusion in the entry of the Maricopa County judgment.

In the plaintiffs' theory of the case it will not be necessary to look into any facts beyond those found by the trial

justice to require this Court to reverse the judgment appealed from, but should the Court desire to examine further into the facts in this case we insist that we have preserved our right to an examination thereof by the practice adopted for our protection.

NINTH POINT.

THE JUDGMENT SHOULD BE REVERSED.

The judgment appealed from is erroneous and should be reversed, and the cause remanded with instructions to enter a judgment appointing a receiver of the Cobre Grande Copper Company; enjoining the further carrying out of the agreement of December 12th, 1901; setting aside the judgment of April 15th, 1901, rendered in the Third District of Arizona in the suit of Cobre Grande Copper Company against Greene and others as fraudulent, permitting plaintiffs and the receiver to intervene in that suit for the protection of their respective rights and interests, directing the deeds taken from the Phœnix National Bank by the defendant Greene and others to be returned to the Bank; and directing and authorizing the receiver thus appointed to take such steps as may be necessary or proper to protect the rights of the Cobre Grande Copper Company in the premises.

Dated, Washington, October Term, 1905.

ALFRED B. CRUIKSHANK,
Of Counsel for Plaintiffs and Appellants.